IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. .....

PAUL D. McGINNIS, Commissioner of Correction of the State of New York, et al.,

Petitioners,

against

MARTIN SOSTRE,

Respondent.

MARTIN SOSTRE,

Petitioner,

against

PAUL D. McGINNIS, et al.,

Respondents.

APPENDIX

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Appendix A.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 180—September Term, 1970.

(Argued to the court *in banc* October 21, 1970. Decided February 24, 1971.)

Docket No. 35038

MARTIN SOSTRE,

Plaintiff-Appellee,

—v.—

PAUL D. MCGINNIS, Commissioner of Correction of the State of New York, VINCENT MANCUSI, Warden of Attica Prison, and HAROLD W. FOLLETTE, Warden of Green Haven Prison,

Defendants-Appellants.

Before:

LUMBARD, *Chief Judge,*
WATERMAN, *Senior Circuit Judge,**
MOORE, FRIENDLY, SMITH, KAUFMAN, HAYS,
ANDERSON and FEINBERG, *Circuit Judges.*

Appeal from a decision and order of the United States District Court for the Southern District of New York, Motley, *Judge,* granting plaintiff punitive and compensatory damages and injunctive relief, pursuant to the Civil Rights Act, 42 U.S.C. § 1983.**

* Judge Waterman was an active circuit judge at the time the court commenced *in banc* consideration of this case.

** This decision is reported at 442 F. 2d 178.

Appendix A.

Reversed in part; modified in part; affirmed in part.

KRISTIN BOOTH GLEN (Victor Rabinowitz, David Rosenberg, Rabinowitz, Boudin & Standard, New York, N. Y., of counsel), *for appellee.*

HILLEL HOFFMAN, Assistant Attorney General of the State of New York (Louis J. Lefkowitz, Attorney General, Samuel A. Hirshowitz, First Assistant Attorney General, on the brief), *for appellant.*

WILLIAM BENNETT TURNER, San Francisco, Calif. (Jack Greenberg, Stanley A. Bass, New York, N. Y., on the brief), *Amicus Curiae, for the N.A.A.C.P. Legal Defense and Educational Fund, Inc., and the National Office for the Rights of the Indigent.*

HAYWOOD BURNS, LOWELL JOHNSTON, MARGARET BURNHAM, New York, N. Y., on the brief, *Amicus Curiae, for The National Conference of Black Lawyers.*

KAUFMAN, *Circuit Judge:*

We voted to hear the initial argument of this appeal *en banc*, a procedure we reserve for extraordinary circumstances, so that we might give plenary review to a complex of urgent social and political conflicts persistently seeking solution in the courts as legal problems, a phenomenon de Tocqueville commented upon many years ago. *Democracy in America*, vol. I at 290 (Vintage ed. 1945). The elaborate opinion and order below raise important questions concerning the federal constitutional rights of state prisoners which neither Supreme Court precedent nor our

own past decisions have answered. The sparse authority from other courts is for the most part either inconclusive or conflicting.

I.

Proceedings Below and Jurisdiction

This is an appeal from an order entered May 14, 1970, by Judge Motley, sitting in the Southern District of New York, 312 F. Supp. 863, which granted plaintiff Martin Sostre punitive and compensatory damages against defendants Follette and McGinnis as well as a wide variety of injunctive relief in his action pursuant to the Civil Rights Act of 1871, 42 U.S.C. § 1983, and 28 U.S.C. §§ 1331, 1343 (3). At the time Sostre filed his handwritten complaint, he was incarcerated in New York's Green Haven Prison (now called Green Haven Correctional Facility), serving a sentence of thirty to forty years for selling narcotics, followed by thirty days further imprisonment for contempt of court, imposed on him March 18, 1968. The original defendants included the Governor of New York as well as the State Commissioner of Correction, appellant McGinnis; the Warden of Green Haven, Harold W. Follette, who died shortly before the opinion below was entered;[1] and the Warden of Attica Prison (now called Attica Correctional Facility), appellant Vincent Mancusi. Sostre had been confined for one night in Attica immediately after sentencing, then transferred the following day to Green Haven.

Sostre does not appeal from the dismissal by the district court of his action against the Governor, in which Sostre

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[1] On June 12, the district court ruled that Follette's successor as Warden (now called Superintendent) of Green Haven would be automatically substituted as defendant in this action under F. R. Civ. P. 25.

had asserted the Governor's complicity in racial discrimination in the administration of New York's prison system.

Because there was no finding below that Warden Mancusi had in any way violated Sostre's constitutional rights, the case against him should also have been dismissed. In refusing this dismissal, Judge Motley observed that Commissioner McGinnis "has the power to re-transfer Sostre to Attica." 312 F. Supp. at 877 n. 8. The relevance of this admitted fact escapes us. After bringing this law suit, Sostre was transferred to Wallkill State Prison, but we suppose that would not justify an injunction directed against the Warden there.

We agree with the district court that Sostre was not required as a precondition of maintaining this suit to perform the meaningless and plainly futile gesture of writing a letter to defendant McGinnis. See *Houghton* v. *Shafer*, 392 U. S. 639 (1968) (per curiam); *Eisen* v. *Eastman*, 421 F. 2d 560 (2d Cir. 1969). The record amply supports the district court's finding that the State Commissioner of Correction "had already been informed of the facts" and further enlightenment from Sostre himself could not have been expected to affect his attitude or his inaction.[2] 312 F. Supp. at 881-82. Nor is exhaustion of state legal or equitable remedies necessary to a Section 1983 action, which provides "a remedy in the federal courts supplementary to any remedy any State might have." *McNeese* v. *Board of Education*, 373 U. S. 668, 672 (1963). See *King* v. *Smith*, 392 U. S. 309 (1968); *Damico* v. *California*, 389 U. S. 416 (1967) (per curiam); *Wright* v. *McMann*, 387 F. 2d 519, 522-23 (1967).

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[2] We also agree with Judge Motley that defendants have not demonstrated the adequacy of other relevant administrative procedures. *See* 312 F. Supp. at 883-84 n. 14.

Moreover, because Sostre "is not challenging the validity of his sentence with the ultimate object of obtaining release" from prison, *Hancock* v. *Avery*, 301 F. Supp. 786, 791 (M.D. Tenn. 1969), his Section 1983 petition is clearly not a mere sham procedure to avoid the exhaustion requirement of the federal habeas corpus statute, 28 U.S.C. § 2254 (b), (c). Cf. *Smartt* v. *Avery*, 411 F. 2d 408 (6th Cir. 1967); *Kalec* v. *Adamowski*, 406 F. 2d 536 (7th Cir. 1969); *Peinado* v. *Adult Auth.*, 405 F. 2d 1185, 1186 (9th Cir.), *cert. denied*, 395 U. S. 968 (1969); *Johnson* v. *Walker*, 317 F. 2d 418, 419-20 (5th Cir. 1963); *King* v. *McGinnis*, 289 F. Supp. 460 (S.D.N.Y. 1968).

II.

Facts

A. *Circumstances of Sostre's Commitment to Punitive Segregation*

On June 25, 1968, Warden Follette ordered that Sostre be committed pursuant to Section 140 of the New York Correction Law[3] to "solitary confinement" (the words in the statute) or "punitive segregation" (the term adopted by Judge Motley and by the parties on appeal, which we will use for that reason and also because he was not as isolated in his segregation as "solitary" would imply). The parties vigorously disagree as to the considerations that motivated Follette to inflict this punishment.

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[3] Section 140 was repealed and replaced with a new Section 137, effective July 8, 1970 (McKinney Supp. 1970). Section 137.6 of the new statute vests the Superintendent of each correctional facility (formerly called the Warden) with discretion to "keep any inmate confined in a cell or room apart from the accommodations provided for inmates who are participating in programs of the facility, for such period as may be necessary for maintenance of order and discipline. . . ."

Appendix A.

On June 25, 1968, the day he put Sostre in segregation, Follette called Sostre to his office. At this meeting, Follette questioned Sostre about his attempt that morning to mail to an attorney, Miss Joan Franklin of the National Association for the Advancement of Colored People, a letter with handwritten legal papers attached, including a motion for use in the trial of Mrs. Geraldine Robinson. Mrs. Robinson is described by Judge Motley and the parties on appeal as Sostre's "codefendant." Although she was joined with Sostre in the indictment which resulted in Sostre's imprisonment, they were not tried together. Follette told Sostre "he must confine his legal activities to his own incarceration" and accordingly that the motion would not be mailed. Follette explained that he objected to Sostre's attempt to "practice law" without a license. Sostre believed that he had a right to mail legal papers in behalf of Mrs. Robinson and refused to assure Follette, as Follette requested, that he would discontinue attempting to mail such documents through normal prison channels.

During the same interview, Follette questioned Sostre about a reference to an organization known as "R.N.A.," mentioned by Sostre in his letter to Miss Franklin and to which Sostre had referred in earlier correspondence. "R.N.A." in fact referred to the Republic of New Africa, which Sostre identified at the trial before Judge Motley as a black liberation or black separatist organization. Sostre disputed Follette's testimony that Sostre had lied about R.N.A. at the June 25 interview by persistently claiming at that time that it was a "federal agency . . . 'Recovery National Administration' or something like this." Sostre did admit, as Follette asserted at trial, that after responding to a few questions Sostre refused to discuss R.N.A. further. The plaintiff's justification for his silence was that Follette had persisted in labelling R.N.A. a "subversive organization." Sostre "clammed up," as he testified, to

avoid antagonizing Follette by further explaining or defending R.N.A.

Follette testified without contradiction that the organization known as the Republic of New Africa was of sufficient concern to him to have been the object of an investigation before the interview with Sostre. Follette feared that "this organization was a cloak for an attempt to organize prison inmates for riot and insurrection," based on information obtained from the F.B.I. and the New York State and Buffalo City Police. "[T]he possibility of insurrection at Green Haven" was a "major fear" to Follette at all times, but particularly so in June, 1968. Security at the prison had been weakened, in Follette's view, by an exceptionally high turnover of correction officers, approaching a rate of about fifty percent each year. An influx of new officers had not yet been cleared through the New York State Identification and Intelligence System. Moreover, Sostre had exacerbated Follette's concern with the possibility of major disorder because of a statement in a letter that Sostre had written to his sister, dated May 19, 1968:

> As for me, there is no doubt in my mind whatsoever that I will be out soon, either by having my appeal reversed in the courts or by being liberated by the Universal Forces of Liberation.

This sentence is included in a broad indictment of militarism and oppression in this country and a prediction that "the power structure" would soon be overthrown.

Follette insists that his decision to commit Sostre to segregation reflected (1) Sostre's declared intent to defy Follette's order by preparing legal papers for his co-defendant; (2) his intransigence about R.N.A.; (3) the allusion in the letter to his sister to his impending liberation. Rule 54 of the "Inmate's Rule Book," a publication of the New York Department of Correction issued to each

prisoner when he arrives at Green Haven, limits inmate correspondence to "their own personal matters." Follette interpreted this as proscribing the sending of legal papers in behalf of a co-defendant. Sostre's refusal to discuss R.N.A. and his persistence about Mrs. Robinson's legal papers both violated Rule 5 of the Inmate Rule Book which requires that an inmate obey orders "promptly and fully," pending whatever appeal he may wish to take to higher authority. In addition, his silence violated Rule 12, enjoining inmates to answer "fully and truthfully" all questions put by prison officials. In sum, Follette assigned as his motive for Sostre's punishment the fact that Sostre's "whole attitude was one of defiance, of flatly refusing . . . to conduct himself as a proper inmate within the rules, regulations and laws set down by the State of New York and the Department of Correction." Section 140 of the New York Correction Law authorized Follette, by its terms, in his unfettered discretion, to commit Sostre to segregation when "necessary . . . to produce [his] entire submission and obedience" and to keep him there "until he shall be reduced to submission and obedience."

Judge Motley disbelieved each of Follette's asserted motives for punishing Sostre, crediting instead Sostre's testimony that Follette was motivated by Sostre's threat to sue Follette over his withholding the motion papers intended for Mrs. Robinson. Additionally, Judge Motley attributed to Follette an intent to punish Sostre because of his earlier activism in bringing litigation related to the practice of the Black Muslim religion in New York prisons and "because he is, unquestionably, a black militant who persists in writing and expressing his militant and radical ideas in prison." She held that the summary meeting with Warden Follette which resulted in Sostre's commitment to segregation did not afford due process of law to Sostre before his "liberty" was taken.

Appendix A.

Apart from the events of the June 25 interview, Judge Motley also dismissed as one of Follette's reasons for continuing Sostre's incarceration in segregated confinement several items of "contraband" which Follette claimed were the fruit of a search of Sostre's cell conducted immediately after he entered segregation. These items consisted of (1) two small (3 inches by 5 inches) pieces of heavy black emery paper covered with an abrasive material like sand which, according to Follette, could be flaked off and in some manner attached to a string to fashion an instrument capable of sawing through cell bars; (2) six tables of contents torn from issues of the *Harvard Law Review* and stamped by prison officials to indicate that the books, Sostre's personal property, were not to circulate to other prisoners; (3) a letter dated June 10, 1968, from the Appellate Division of the Supreme Court of New York addressed to a fellow-prisoner of Sostre's Juan Moline, a Puerto Rican, which Sostre later explained he was translating for Moline from English into Spanish. Judge Motley believed Sostre's testimony that he had never seen the pieces of emery paper before they were introduced by defendants at trial. 312 F. Supp. at 869. The other contraband indicated that Sostre had violated prison rules by circulating his law periodicals to other prisoners and by giving a fellow-prisoner legal assistance without first securing the Warden's permission. The Court below not only declined to find that these activities motivated the punishment of Sostre, but held in addition, that Sostre's activities were protected by the Fourteenth Amendment.[4]

[4] On July 11, 1968, Deputy Warden Sawner called Sostre before a "disciplinary court," conducted by Sawner alone, and charged Sostre with sending letters covertly to unauthorized correspondents under the guise of writing to his sister, Letitia. Sostre admitted the infraction, which Follette claimed to have been under investigation as early as June 25, the day he committed Sostre to segregation. For this violation, Sostre was penalized with the loss of 90 days of "good behavior time" credit. In addititon, Letitia was removed from the list of Sostre's approved correspondents.

Appendix A.

B. *Conditions of Punitive Segregation*

Sostre remained confined in punitive segregation for twelve months and eight days, until Judge Motley restrained his continued punishment *pendente lite* on July 2, 1969. By regulation, Sostre lost the opportunity to earn 124⅓ days of good behavior credit while he was segregated.[5] We cannot avoid setting forth the precise conditions of Sostre's long confinement with some particularity because Judge Motley found as a matter of law, that (1) in view of those conditions, Sostre's punishment—or any confinement in segregation under similar conditions for longer than 15 days—was "cruel and unusual" under the Eighth Amendment; (2) this absolute rule aside, Judge Motley held that the penalty inflicted upon Sostre was so disproportionate to the offenses charged against him that his segregation would have been cruel and unusual even crediting each of Follette's assigned justifications for it. We cannot approve these conclusions. Our reasons for refusing to do so are based in part on undisputed facts in the record which do not appear in Judge Motley's otherwise entirely accurate description of Sostre's segregated environment. The following account draws upon those un-

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[5] New York State prisoners may earn a maximum of ten days "good behavior time" credit each month, thereby advancing both the date the prisoner will be eligible for parole and the date he is entitled as of right to be "conditionally released" (that is, released from custody subject to parole conditions). Prison authorities may restore good behavior time withheld or revoked. See N. Y. Penal Law §§ 70.30.4, 70.40.1 (McKinney 1967); N. Y. Correction Law §§ 230, 803 (McKinney 1968). The repeal of Section 230, as of July 8, 1970 (McKinney Supp. 1970), does not affect allowances for good behavior permitted prior to that date. Forfeiture of the chance to earn "good time" credit during punitive segregation is prescribed by regulation. 7 N. Y. Codes, Rules & Regulations, Correction § 260.4.

disputed facts which do not appear in the opinion below, as well as those which do, in an effort to present the whole fabric.

1. *Isolation from Human Contact*

Although for four months only one other prisoner was confined with Sostre in his small "segment" of five cells, the entire punitive segregation unit at Green Haven housed on the average about 15 prisoners at any one time. During the period between June 28, 1967, and September 18, 1968, 179 prisoners were held in segregation for a total of 8,960 days. From September 19, 1968 to July 3, 1969, when Sostre was there, a total of 79 inmates were segregated at Green Haven. Of these, about ten percent were held in "protective" segregation. This term is used to describe those who are segregated from the general population to protect them from harm rather than as punishment. These prisoners were incarcerated in cells entirely separated from Sostre's cell in the punitive segregation unit. The other prisoners were confined in cells near Sostre's, so that he would have been able to communicate with them, albeit with some difficulty depending on the distance between Sostre and the other prisoners. We are informed of an incident where one prisoner brought to solitary and placed in another group of cells committed suicide. Sostre was able to communicate with this inmate and indeed was able to dictate a legal document to him.

Finally, although we do not doubt that "the crux of the matter is human isolation," as Judge Motley observed, Sostre aggravated his isolation by refusing to participate in a "group therapy" program offered each inmate in segregation beginning October or November 1968. "Therapy" sessions were conducted in groups of about eight per class, generally one each week or ten days, under the guidance of a "recreation supervisor," Sergeant Louis Profera. Pro-

fera had been trained in group counseling in a six month, 40-hour course by a psychiatrist at the New York State Vocational Institution. Special rules for punitive segregation posted in the segregation unit provided that inmates in punitive segregation would be "returned to the general population after demonstrating their willingness to accept and adhere to the institutional rules and regulations as shown by their participation in group counselling sessions. . . . Refusal to participate in group counselling is indicative of the inmate's unwillingness to accept and abide by the rules and regulations of the institution." Profera's favorable recommendation generally resulted in a prisoner's release from segregation. Although one prisoner who testified at trial returned to the general population without participating in group therapy, there is no doubt that there was significant pressure to participate. Expert witnesses at trial disagreed as to whether coercion would increase or decrease the efficacy of group therapy.[6]

2. *Other Conditions of Sostre's Segregated Confinement*

Judge Motley heard extensive testimony describing such important details as Sostre's diet, his opportunity for exercise, the hygienic conditions of his cell, and the possibility for intellectual stimulation. It can hardly be questioned that his life in segregation was harsher than it would have been in the general population, but neither was it clearly unendurable or subhuman or cruel and inhuman in a constitutional sense.

Thus, Sostre would not be served seconds of the main course upon his demand; but there was no testimony that he would have had that privilege in the general population. He was denied the dessert that would have been available

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[6] See n. 11, *infra*.

to the general population; but apart from the dessert his diet still consisted of 2800 to 3300 calories a day.[7] Sostre remained in his cell at all times except for a brief period once each week to shave and shower. An hour of exercise with four or five other prisoners in a small, enclosed yard, open to the sky was a daily routine. But the record reveals that Sostre refused this privilege because he would not submit to a "strip search." Officials testified that it was necessary to subject prisoners to such an examination each time they entered the exercise yard to prevent them from concealing on their bodies small bits of wire or other material suitable for use as a weapon.

Hygienic conditions were at least minimally adequate to permit Sostre to remain clean and healthy. Thus, Sostre was allowed to shave and shower with hot water once each week. The furnishings of his normal-sized (6 ft. x 8 ft.) cell included a toilet and a face bowl with running cold water, and he was provided with soap and a towel.

The strictures on Sostre's intellectual fare were severe. He could not buy or receive books, magazines or newspapers, and his access to the prison's library collection was limited to a selection among approximately thirty-five volumes, mostly "shoot-em-ups" as Sostre described them, chosen by the prison guards. Still, light from a single bulb, controlled by the guards and usually turned on early in the morning and off at 10 p.m., was adequate for reading. And although he could not attend school or watch television, as could the inmates in the general population, any material related to the law requested by him would be brought to his cell.

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[7] Several prisoners who had served time in Green Haven's punitive segregation unit testified that more punishing than the deprivation of desserts was the loss of the opportunities available to the general population to receive food packages from the outside, to borrow snacks from other prisoners, and to earn pay with which to buy extra food from the prison commissary.

Appendix A.

3. *Length of Segregated Confinement*

Pursuant to the usual practice at Green Haven, Sostre was sentenced to "solitary" confinement for an indefinite period. According to New York Correction Law Section 140, "submissiveness" was to be the touchstone for his release. Follette testified that Sostre could have returned to the general population either by successful participation in group therapy or by agreeing to live by the rules of the prison. Sostre's contention is that he refused to agree to obey rules that he considered an infringement of his constitutional rights.

C. *Censorship and Possession of Literature*

Defendant Follette censored Sostre's correspondence with Joan Franklin of the NAACP, the attorney of record representing Sostre on appeal from his conviction. Follette regularly excised from letters passing between Sostre and Miss Franklin "objectionable" material—anything which "in his judgement was not relevant to Sostre's appeal." In accordance with Rule 47 of the Inmate Rule Book which restricts inmates' correspondence to persons on an approved mailing list, Warden Follette, in late September, 1968, refused to forward a letter from Sostre to the United States Post Office Inspector, in which Sostre complained of Green Haven's practice of not returning to prisoners receipts for certified mail. The district judge found that each of these actions violated Sostre's First Amendment right to freedom of speech.

About August 3, 1969, a month after his release from segregation, Sostre was deprived of the use of the prison exercise yard and the privilege of attending movies because he possessed "inflammatory racist literature" in his cell. The literature consisted of articles written by Sostre himself on paper properly in his possession. Most of the

articles consisted of extracts from magazines and newspapers which Sostre was also permitted to have and read in his cell. The extracts included quotations from Mao Tse Tung, poetry written by a prison inmate, the names of the officers, the party program, and rules of conduct of the Black Panther Party; the officers and oath of allegiance of the Republic of New Africa; a "program" for Black Student Unions; and the poem "If We Must Die," by Claude McKay. In addition, guards found in Sostre's cell an article which he had written himself, entitled "Revolutionary Thoughts." The district court found that Sostre's punishment for possessing this material constituted another infringement of his freedom of expression.[8]

III.

The District Court's Order

Upon these findings which we have necessarily sketched, Judge Motley on May 14, 1970, entered the following order, which because of its complexity and importance to the questions we must decide, we reproduce in full. The district court subsequently granted a stay of its order pending appeal as to the bracketed portions. A stay as to the remainder of the order was denied.

> It is now Ordered, that defendants Follette, McGinnis and Mancusi, their employees, agents, successors, and all persons in active concert and participation with them be, and they are hereby, perpetually enjoined and restrained from:

[8] On the date Sostre was released from segregation he was punished by confinement to his cell for several days, ostensibly because "dust" was found on his cell bars. Although Judge Motley found that this punishment represented "retaliation for his legal success," no relief was predicated on this finding and hence the incident need not concern us further.

Appendix A.

1) Returning plaintiff to punitive segregation for charges previously preferred against him;

2) Placing plaintiff in punitive segregation or subjecting him to any other punishment as a result of which he loses accrued good time credit or is unable to earn good time credit, without:

a. giving him, in advance of a hearing, a written copy of any charges made against him, citing the written rule or regulation which it is charged he has violated;

b. granting him a recorded hearing before a disinterested official where he will be entitled to cross-examine his accusers and to call witnesses on his own behalf;

c. granting him the right to retain counsel or to appoint a counsel substitute;

d. giving him, in writing, the decision of the hearing officer in which is briefly set forth the evidence upon which it is based, the reasons for the decision, and the legal basis for the punishment imposed.[2]

[3) Censoring, refusing to mail or refusing to give to Sostre: 1) Any communication between Sostre and the following—(a) any court; (b) any public official or agency; (c) any lawyer; (d) his co-defendant in the criminal matter pending against him; and, 2) Any letter relating to any legal matter to or from any other inmate who requests the assistance of Sostre in translating that letter into English.]

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[2] A panel of this court on July 10, 1970, expedited the appeal and granted a further stay of subparagraph 2 to the extent that it was limited to placing Sostre in punitive segregation for more than three days at any one time or a total of more than ten days, pending the hearing of this appeal.

4) Punishing Sostre for sharing with other inmates his law books, law reviews, and other legal materials, and from refusing to permit Sostre to assist any other inmate in any legal matter as long as defendants have not provided any court approved alternative means of legal assistance for such inmates.

[5) Punishing Sostre for having in his possession political literature and for setting forth his political views orally or in writing, except for violation of reasonable rules approved by the court regulating freedom of speech.]

[It is further ORDERED that the above named defendants submit, within 90 days from the date of this order, for approval by this court, proposed rules and regulations governing the following:

1) the receipt, distribution, discussion and writing of political literature;

2) all future disciplinary charges and hearings with respect thereto where the possible punishments include solitary confinement, punitive segregation or any other segregation, and any other punishment in connection with which there is loss of, or inability to earn, good time credit.]

It is further ORDERED that the above named defendants and their agents credit plaintiff with the 124½ days of good time credit which he was unable to earn while wrongfully incarcerated in punitive segregation from June 25, 1968 to July 2, 1969.

[It is further ORDERED that the plaintiff, Martin Sostre, recover of the defendants, Warden Follette, and Commissioner McGinnis the sum of $13,020.00.]

Appendix A.

IV.

PUNISHMENT FOR POLITICAL BELIEFS AND LEGAL ACTIVITIES

The question as to the propriety of withdrawing from incarcerated individuals constitutional privileges enjoyed by citizens of the community, although troublesome, is not new to the courts. It is clear that in many respects the constitutionally protected freedoms enjoyed by citizens-at-large may be withdrawn or constricted as to state prisoners, so far as "justified by the considerations underlying our penal system," *Price* v. *Johnston*, 334 U. S. 266, 285 (1948). Federal courts have been reluctant to intrude themselves into the complex and delicate problems of prison administration. E.g., *U. S. ex rel. Knight* v. *Ragen*, 337 F. 2d 425 (7th Cir.), cert. denied, 380 U. S. 985 (1964); *Hatfield* v. *Bailleaux*, 290 F. 2d 632, 640 (9th Cir. 1961); *Childs* v. *Pegelow*, 321 F. 2d 487 (4th Cir. 1963). The time is long since past, however, when a court might describe a prisoner as temporarily "a slave of the state," *Ruffin* v. *Commonwealth*, 62 Va. (21 Gratt.) 790, 796, or treat him as such. Among those rights *not* taken from Sostre when he entered Attica, either "expressly or by necessary implication," *Coffin* v. *Reichard*, 143 F. 2d 443, 445 (6th Cir. 1944), is freedom from discriminatory punishment inflicted solely because of his beliefs, whether religious or secular. *Cooper* v. *Pate*, 378 U. S. 546 (1964) (per curiam) (unlawful to withdraw prison privileges because of inmate's religious faith); see *Lee* v. *Washington*, 390 U. S. 333 (1968) (per curiam) (racial segregation); *Fulwood* v. *Clemmer*, 206 F. Supp. 370, 373-74 (D.C.D.C. 1962) (religious discrimination). Moreover, the Constitution protects with special solicitude, a prisoner's access to the courts. *Ex parte Hull*, 312 U. S. 546 (1941); *Johnson* v. *Avery*, 393 U. S. 483 (1969). Accordingly, Sostre's lengthy

confinement to segregation violated due process of law if, as the district court found, Warden Follette inflicted the punishment either because of Sostre's militant political ideas or his litigation, past or threatened, against Follette or other state officials.

Sostre does not shrink from characterizing himself as a "jailhouse lawyer" and the record before us does justice to this label, as does the history of Sostre's earlier period of confinement in New York prisons from 1952-64 following his first conviction for selling narcotics. It is not unreasonable to suppose, as the district court apparently did, that Warden Follette was aware of Sostre's Black Muslim activities during that period; of his solitary confinement in Attica Prison for four years, resulting from his religious activism; and of his success in securing through earlier litigation before this court the recognition of certain constitutional liberties for state prisoners. See *Pierce* v. *LaVallee*, 293 F. 2d 233 (2d Cir. 1961); *Sostre* v. *McGinnis*, 334 F. 2d 906 (2d Cir.), cert. denied, 379 U. S. 892 (1964). Sostre's version of his June 25, 1968, interview with Follette, if believed, was a proper basis for Judge Motley's conclusion that Follette committed Sostre to segregation, if not in retaliation for his black militancy or past litigation, then at least to squelch Sostre's threat to take Follette to court over his censorship of Sostre's correspondence. Some substantiation for Sostre's account might be inferred from Follette's summary commitment of Sostre, without following the practice described in the New York Department of Correction's Employees' Rule Book (Rule 8.4), requiring trial by a "disciplinary officer or court."

On this evidence, we cannot conclude that the district judge was "clearly erroneous" in attributing improper motives to Follette, affording as we must "due regard . . . to the opportunity of the trial court to judge of the credibility" of Sostre and Follette, F. R. Civ. P. 52(a). See *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U. S.

100 (1969) (reviewing court may overturn finding if on the entire evidence it is left with the definite and firm conviction that a mistake has been made). On the other hand, McGinnis was not privy to Follette's interview with Sostre. The record is barren of any justification for attributing to him, in sanctioning Sostre's continued confinement, any more sinister motive than appropriate deference to the judgment of Warden Follette. McGinnis on the record before us, had no reason to suspect Follette of other than proper motivation.[19]

V.

Cruel and Unusual Punishment

A reflection of maturing sensitivity in this country to the condition of some of our prisons may be seen in the district court's finding that deprivations such as Sostre endured for a year may not again be inflicted on New York State prisoners for longer than fifteen days, and only then for serious violations of prison rules. Otherwise, Judge Motley held, such punishment would run ashoal of the Eighth Amendment prohibition of cruel and unusual punishment, as applied to the states through the due process guarantee of the Fourteenth Amendment, *Robinson* v. *California*, 370 U. S. 660 (1962).

We respect the outrage, given form and content by scholarly research and reflection, that underlay the expert testimony at trial of Sol Rubin, for many years Counsel for the National Council on Crime and Delinquency, and Dr. Seymour Halleck, a psychiatrist at the University of Wisconsin with long experience in state correctional prac-

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[19] All Commissioner McGinnis knew (or should have known of the reasons for Sostre's confinement was communicated to him by Follette, see 312 F. Supp. at 882, who of course did not relay Sostre's version of the June 25, 1968 interview.

tices. Mr. Rubin testified that Sostre's segregated environment was degrading, dehumanizing, conducive to mental derangement, and for these reasons "a gross departure" from enlightened and progressive contemporary standards for the proper treatment of prison inmates. Dr. Halleck feared that the isolation from human contact in punitive segregation might cause prisoners to hallucinate and to distort reality. Long-term isolation might have so serious an impact, in fact, as to "destroy" a person's "mentality". Dr. Halleck singled out for particular censure Green Haven's "group therapy" program, whose compulsory aspects he found repugnant to effective treatment of participants and indeed inconsistent with minimal standards of professionalism among trained group counsellors.[11]

Nor would candor permit us to dismiss these opinions as aberrational among those views revealed in relevant sources referred to us by counsel or known to us through our own research. To the contrary, it would not be misleading to characterize many of the opinions of plaintiff's experts as fairly representative of the perspective of adherents to the "new penology," see *Knuckles* v. *Prasse*, 302 F. Supp. 1036, 1047-48 (E.D. Pa. 1969), the thrust of whose doctrine may be gauged by the preference for the adjective "correctional" rather than "penal" as more accurately indicating the proper function of a prison system.[12] The rapidly rising standards in the field of penol-

[11] Dr. William C. Johnston, a psychiatrist and Director of Mattawan State Hospital for the criminally insane, with extensive experience in dealing with mentally disturbed prisoners, rejected Dr. Halleck's assessment. Dr. Johnston reported that he had in fact supervised a successful compulsory group counseling program while Director of Dannemora State Hospital. Dr. Johnston also did not agree with plaintiff's experts that segregated confinement would likely endanger prisoners' sanity.

[12] Hearings on H.R. 6964, H. Subcomm. No. 3, Comm. on the Judiciary, 89th. Cong., 1st Sess., at 2 (May 20, 1965) (testimony of Nicholas deB. Katzenbach).

ogy and corrections that Mr. Rubin referred to in his testimony are reflected in a growing preoccupation with institutional strictures and techniques designed to "reintegrate" prisoners with society or, in the jargon of the experts, to "provide . . . motivation for acquiring a conventional role in a non-delinquent setting."[13] Conjugal visiting, daytime work or educational-release programs, vocational training, half-way houses, and inmate publication of prison newspapers are some of the vanguard weapons in the "modern" approach to prison administration. The key concepts are access and involvement of prisoners with the free society "on the outside."[14] Anathema to this perspective are perhaps more traditional practices which subject prisoners to deprivation, degradation, subservience, and isolation, in an attempt to "break" them and make them see the error of their ways.[15] It is sug-

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[13] See *U. S. Bureau of Prisons, The Residential Center: Corrections in the Community* (1970).

[14] *See, e.g.*, Garabedian, *Challenges for Contemporary Corrections*, 33 *Fed. Prob.* No. 1, at 3 (Mar. 1969); Rachin, *The Message Corrections Must Get Across*, 34 *Fed. Prob.* No. 2, at 3 (June 1970); *Summary of The Report of the President's Task Force on Prisoner Rehabilitation* (1970), 34 *Fed. Prob.* No. 3, at 3 (Sept. 1970). We do not ignore New York's active participation in this reform movement. See N. Y. Correction Law Art. 26 (McKinney Supp. 1970) (work release program).

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> "Traditional prisons, jails, and juvenile institutions are highly impersonal and authoritarian. Mass handling, countless ways of humiliating the inmate in order to make him subservient to rules and orders, special rules of behavior designed to maintain social distance between keepers and inmates, frisking of inmates, regimented movement to work, eat, and play, drab prison clothing, and similar aspects of daily life—all tend to depersonalize the inmate and reinforce his belief that authority is to be opposed, not cooperated with . . . Such an attitude is, of course, antithetical to successful reintegration."
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> *President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Corrections* 11 (1967) (hereinafter cited as *"Corrections"*).

gested by many observers that such techniques are counter-productive, tending only to instill in most prisoners attitudes hostile to rehabilitation, summarized by one author as "doubt, guilt, inadequacy, diffusion, self-absorption, apathy [and] despair." [16]

We do not question, either, the relevance to an inquiry under the Eighth Amendment of opinions which may represent a progressing sense of humaneness as well as a new calculation as to the efficacy of penal practices. See *Trop* v. *Dallas*, 356 U. S. 86, 101 (1958) (Eighth Amendment invokes "the evolving standards of decency that mark the progress of a maturing society").

For a federal court, however, to place a punishment beyond the power of a state to impose on an inmate is a drastic interference with the state's free political and administrative processes. It is not only that we, trained as judges, lack expertise in prison administration. Even a lifetime of study in prison administration and several advanced degrees in the field would not qualify us *as a federal court* to command state officials to shun a policy that they have decided is suitable because to us the choice may seem unsound or *personally* repugnant. As judges we are obliged to school ourselves in such objective sources as historical usage, see *Wilkerson* v. *Utah*, 99 U. S. 130 (1870), practices in other jurisdictions, see *Weems* v. *United States*, 217 U. S. 349 (1910), and public opinion, see *Robinson* v. *California*, 370 U. S. 660, 666 (1962), before we may responsibly exercise the power of judicial review to declare a punishment unconstitutional under the Eighth Amendment.

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[16] Chief Justice Burger, a persistent critic of our system of criminal justice which places every protection around an accused but seems to abandon him when he is sentenced to prison, recently observed that "a man in a cage needs incentive, motivation, and something to look forward to." *U. S. News and World Report* 32 (Dec. 14, 1970).

Accordingly, we have in the past declined to find an Eighth Amendment violation unless the punishment can properly be termed "barbarous" or "shocking to the conscience." See *Church* v. *Hegstrom*, 416 F. 2d 449, 451 (2d Cir. 1969). Although the conditions Sostre endured were severe, we cannot agree with the district court that they were "so foul, so inhuman, and so violative of basic concepts of decency," *Wright* v. *McMann*, 387 F. 2d 519 (2d Cir. 1967),[17] as to require that similar punishments be limited in the future to any particular length of time. Nor can we agree that Sostre's own long confinement—however contrary such prolonged segregation may be to the views of some experts—would have been "cruel and unusual" had Sostre in fact been confined for the reasons asserted by Warden Follette, rather than on account of his beliefs and litigiousness.

It is undisputed on this appeal that segregated confinement does not itself violate the Constitution. See *Burns* v. *Swenson*, —— F. 2d —— (8th Cir., Aug. 31, 1970); *Courtney* v. *Bishop*, 409 F. 2d 1185 (8th Cir.), *cert. denied*, 396 U. S. 915 (1969); *Graham* v. *Willingham*, 384 F. 2d 367 (10th Cir. 1967); *U. S. ex rel. Knight* v. *Ragen*, 337 F. 2d 425 (7th Cir. 1964), cert. denied, 380 U. S. 985 (1965); *Krist* v. *Smith*, 309 F. Supp. 497 (S. D. Ga. 1970); *Roberts* v. *Barbosa*, 227 F. Supp. 20 (S. D. Calif. 1964). Indeed, we learn that a similar form of confinement is probably used in almost every jurisdiction in this country and has been described as one of "the main traditional disciplinary tools" of our prison systems. *President's Commission*

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[17] Cf. *Burns* v. *Swenson*, —— F. 2d —— (8th Cir. Aug. 31, 1970) ("base, inhuman, and barbaric"); *Hancock* v. *Avery*, 301 F. Supp. 786, 791-92 (M.D. Tenn. 1969) ("barbaric," "debasing," "violates basic standards of human decency"); *Holt* v. *Sarver*, 309 F. Supp. 362, 380 (E.D. Ark. 1970) ("grossly excessive," "shocking or disgusting"); *Jordan* v. *Fitzharris*, 257 F. Sup. 674 (N.D. Calif. 1966) ("shocking and debased" conditions justify court's intervention to "restore the primal rule of a civilized community").

on Law Enforcement and Administration of Justice, Task Force Report: Corrections 50-51 (1967); *S. Rubin, et al., The Law of Criminal Corrections* 293 (1963).[18] Plaintiff has directed our attention to currently operative rules in other jurisdictions which limit the duration of segregated confinement, and to several commentaries recommending or approving such rules.[19] In several states, however, incarceration in segregated cells seems to be for an indefinite period, as it is in New York.[20] The federal practice appears to be that prisoners shall be retained in solitary "for as long as necessary to achieve the purposes intended," sometimes "indefinitely." Furthermore, "willful refusal to obey an order or demonstrated defiance of

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[18] Indeed, the first prisons in this country, widely imitated in Europe, were intended "to serve as place[s] for reflection in solitude leading to repentance and redemption." The Eastern State Penitentiary in Pennsylvania (1829), where inmates lived, worked, and exercised without being permitted to talk with fellow prisoners "was copied abroad perhaps more than any other American invention." *Corrections* 3. See *American Correctional Ass'n, Manual of Correctional Standards* 13 (3d ed. 1966) [hereinafter cited as "*Manual*"]. All forms of prison punishment in this country pale by comparison with those endured by Henri Charriere in the dungeons and French Penal Colony described in his book *Papillon* (Morrow 1970).

[19] See Tenn. Code Ann. § 41-707 (maximum 30 days solitary for each offense); *Corrections* 210 (disciplinary confinement maximum 30 days); American Correctional Ass'n, *Manual* 418 (punitive segregation maximum 30 days); *American Law Institute, Model Penal Code* § 304.7(3) (Proposed Official Draft 1962) (disciplinary confinement maximum 30 days). However, comparisons and extrapolations are hazardous where factual contexts are lacking. For example, The American Correctional Association, *Manual* 419, would apparently not proscribe indefinite confinement to "administrative segregation." The practical distinction intended between "punitive" and "administrative" segregation may or may not parallel that at Green Haven Prison between "punitive" and "protective" segregation.

[20] Mo. Rev. Stat. § 216.405, cited in *Burns* v. *Swenson*, —— F. 2d —— (8th Cir. Aug. 31, 1970); statutes cited *American Law Institute, Model Penal Code* § 305.7.6 n. 13 (Tent. Draft No. 12, 1960).

personnel acting in line of duty may constitute sufficient basis for placing an inmate in segregation."[21] Such analogous practices[22] do not impel us to the conclusion that the Eighth Amendment forbids indefinite confinement under the conditions endured by Sostre for all the reasons asserted by Warden Follette until such time as the prisoner agrees to abide by prison rules—however counterproductive as a correctional measure or however personally abhorrent the practice may seem to some of us.

In arrving at this conclusion,[23] we have considered

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[21] *Bureau of Prisons, Policy Statement: Inmate Discipline, No.* 7400.5A, ¶ 3c, App. B ¶ 1.d (8) (July 2, 1970).

[22] The Supreme Court has struck down a choice of punishments only when the penalty was authorized in almost no other civilized jurisdiction, *Trop* v. *Dulles*, 356 U. S. 86 (1958); *Weems* v. *United States*, 217 U. S. 349 (1910), or conflicted with moral precepts "universally held," *Robinson* v. *California*, 370 U. S. 660 (1962). See also *Jackson* v. *Bishop*, 404 F. 2d 571, 580 (8 Cir. 1968) (use of strap permitted in only two states, outlawed in several).

[23] Judge Feinberg expresses the view in his dissent, that "isolation of an adult prisoner for a sharply limited period as punishment for a serious breach of prison discipline" would be constitutional. But then he goes on to ask rhetorically whether solitary or segregated confinement "for two years instead of one, or for five years, or for ten, or more," would be constitutional. We have made an effort to suggest the impracticality of setting any specific time period for segregated confinement, beyond which the punishment would be "cruel and unusual." In some instances, depending upon the conditions of the segregation, and the mental and physical health of the inmate, five days or even one day might prove to be constitutionally intolerable. We would ask our dissenting brother in turn, would nine months, six months, or three months of segregated confinement be unconstitutional, without reference to the circumstances of confinement?

Judge Feinberg is also properly concerned with "endless solitary confinement . . . unless the prisoner 'gives in.'" Our response is that we are concerned also. But one must ask on what was it that Sostre was expected to "give in." He was asked to show a change in his intransigent defiance of several prison regulations, defiance which posed a credible threat to the security of the prison, by attending group therapy sessions. Does it violate principles of fundamental decency to insist that a prisoner comply with reasonable rules applicable to all similarly situated?

Appendix A.

Sostre's diet, the availability in his cell of at least rudimentary implements of personal hygiene,[24] the opportunity for exercise[25] and for participation in group therapy,[26] the

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[24] In response to Judge Feinberg's dissent, we emphasize that no one testified that based on his observation or as the result of a physical or psychological examination of Sostre, he concluded that Sostre was being adversely affected or that his physical or mental health was threatened. We note that the record shows that a prison physician visted Sostre's segregation unit daily, and at no time did the physician observe, or did Sostre call to his attention, any such effects.

Indeed, the experts before the district court were in conflict even over the hypothetical question whether the conditions that Sostre experienced in segregation would be dangerous to the sanity of "a prisoner." See pp. 20-21a and fn. 11, *supra*. On the basis of these conflicting expert opinions, Judge Feinberg observes that the district court found as a fact that these conditions "could only serve to . . . . undermine the sanity of the prisoner" . . . when imposed for more than fifteen days. We do not agree with our brother that we are required to declare this "finding" to be either right or wrong, either "clearly erroneous" or adequately supported by the record and therefore correct. We are not concerned here with conflicting testimony of witnesses to the same *unique* historical event. The question, rather, is a *general* one: whether the Eighth Amendment absolutely forbids a state to use a means of discipline when there is no evidence of any physical or psychological injury to the health of the prisoner who complains of the measure, and also when the opinions of the experts as to the effects of the *type* of discipline are in conflict. To hold the district court either right or wrong would be tantamount to ruling that either Dr. Halleck or Dr. Johnston is right, and the other is wrong. That is not our function, nor was the function of the district court. It is a judgment among competing, rational policies, a judgment therefore properly reserved for decision by state political and administrative processes. See, e.g., *Ginsberg* v. *New York*, 390 U. S. 629, 642-43 (1968).

[25] This element distinguishes the instant case from *Krist* v. *Smith*, 309 F. Supp. 497, 501 (S. D. Ga., 1970), where the court found no constitutionally acceptable justification for denying segregated prisoners a chance to exercise.

[26] In view of the widely recognized and critical shortage of specialists such as psychologists in prison systems generally, it

(*footnote continued on following page*)

provision of at least some general reading matter from the prison library and of unlimited numbers of law books, and the constant possibility of communication with other segregated prisons. These factors in combination raised the quality of Sostre's segregated environment several notches above those truly barbarous and inhumane conditions heretofore condemned by ourselves and by other courts as "cruel and unusual."[27] See *Ford* v. *Board of Managers*, 407 F. 2d 937 (3rd Cir. 1969) (no running water or washbowl; bread and water diet except one regular meal each third day; held constitutional); *Landman* v. *Peyton*, 370 F. 2d 135 (4th Cir. 1966), *cert. denied*, 388

(Footnote continued from previous page)

could defy reality to discount the value of the group therapy program because of the somewhat limited training and experience of the leader. *Corrections*, 205. As noted above, pp. 20a-21a and fn. 11, *supra*, the expert testimony at trial below conflicted as to the impact on the effectiveness of group sessions of coercing prisoners' participation.

[27] E.g., *Wright* v. *McMann*, 387 F. 2d 519, 521 (2d Cir. 1967) (complaint alleged cell encrusted with excrement; plaintiff entirely naked 11 days, then clad only in thin underwear; windows open throughout subfreezing night; prisoner slept on concrete floor; no soap, towel, or toilet paper); *Hancock* v. *Avery*, 301 F. Supp. 786 (M. D. Tenn. 1969) (virtually no light or ventilation; hole for wastes flushed irregularly by guards; no soap, towel, or toilet paper; two meals of bread, one full meal); *Jordan* v. *Fitzharris*, 257 F. Supp. 674 (N.D. Calif. 1966) (conditions similar to *Hancock* and in addition prisoner slept naked on concrete floor).

Sostre does not allege that he was arbitrarily or discriminatorily punished or abused by prison authorities while he was segregated. See *Fulwood* v. *Clemmer*, 206 F. Supp. 370 (D.C.D.C. 1962) (plaintiff, among other things, unlawfully denied exercise of his religion while segregated and improperly transferred from prison to a jail because of his religion); *Holt* v. *Sarver*, 309 F. Supp. 362, 380 (E.D. Ark. 1970) (prisoners subjected to arbitrary power of other prisoners). Cf. *Jackson* v. *Bishop*, 404 F. 2d 571, 579 (8th Cir. 1968) (impossible for prison authorities or courts to supervise administration of corporal punishment so as to prevent excesses).

U. S. 920 (1967); *Knuckles* v. *Prasse*, 302 F. Supp. 1036 (E. D. Pa. 1969) (400 days segregation held constitutional).

Finally, we cannot agree with Judge Motley that even if New York might in an appropriate case subject a prisoner to the conditions of Sostre's segregated confinement, had Follette's motives been as he described them, the punishment would in any event have been unconstitutionally disproportionate to the offense. Were we to rule otherwise, we would deny to prison authorities the power to use an entirely constitutional means of discipline in response not only to a credible threat to the security of the prison, but in response to a prisoner's refusal to answer appropriate questions put by prison authorities and to obey valid prison regulations.[25]

VI.

Procedural Due Process

A divergence of perspectives similar to those we have seen in considering the Eighth Amendment issue is presented in another form by the district court's order that Sostre may not be punished in the future in such a way as to forfeit earned "good time" credit or to lose the chance to earn such credit unless he has (a) written notice of the charges against him; (b) a recorded hearing before a disinterested official with a chance to cross-examine adverse

[25] We stress the seriousness of the multiple offenses charged against Sostre by Warden Follette, see pp. 1642-45, *supra*, and express no view as to the constitutionality of such segregated confinement as Sostre experienced if it were imposed for lesser offenses. Specifically, we express no view as to the constitutionality of such segregated confinement if it had been imposed on account of any one or any combination of the offenses charged against Sostre other than all of them.

witnesses and call witnesses in his own behalf; (c) the right to retain counsel or counsel substitute; and unless (d) a written decision is rendered."[29]

Sostre presses upon us a variety of cases, relied upon by the district court and said to be analogous to this case, in which federal courts have required states to square corners before exacting a penalty by following procedures similar to those mandated by Judge Motley. Particular importance is attached to *Goldberg* v. *Kelly*, 397 U. S. 254 (1970), where the Supreme Court announced that before states may terminate welfare payments they must adopt "minimum procedural safeguards" and afford those who are to suffer loss "rudimentary due process," including advance written notice and a hearing at which the welfare recipient may cross-examine adverse witnesses and be represented by counsel. In addition, there must be a written statement of reasons for any termination, including some indication of the evidence supporting the adverse decision.

Our recent decision in *Escalera* v. *New York City Housing Authority*, 425 F. 2d 853 (2d Cir. 1970), instructed that a state's withdrawal of the "privilege" of residing in a public housing project was onerous enough to require it to provide those affected with adequate advance notice, a hearing, access to adverse evidence, cross-examination of adverse witnesses, full disclosure of rules governing the

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[29] Judge Foley of the Northern District of New York has adopted the procedural aspect of Judge Motley's order. *Wright* v. *McMann*, —— F. Supp. —— (July 31, 1970), *on rehearing after remand*, 387 F.2d 519 (2d Cir. 1967). In *Carothers* v. *Follette*, —— F. Supp. —— (S.D.N.Y. Sept. 8, 1970), Judge Mansfield approved aspects of these procedures, remarking that "any serious charge" would require such "essential elements of fundamental procedural fairness" as "an opportunity to present evidence before a relatively objective tribunal."

hearing, and a reasoned decision based solely on the evidence adduced at the hearing.

Somewhat closer in point to the present case is *Mempa* v. *Rhay*, 389 U. S. 128 (1967). The court held that representation of petitioners by counsel was essential to the fairness of their deferred sentencing proceedings.[*] The imposition of sentence had been suspended and the petitioners placed on probation. In the proceedings under review, defendants were faced with both sentencing and imprisonment on the first convictions for committing second offenses while out on probation. The Supreme Court determined that defendants should have been represented by counsel. Legal skills, the Court reasoned, would have aided petitioners in "marshalling the facts" and might have ensured that important legal rights were not lost because unexercised at that stage.

Federal court's disagree as to the reach of *Mempa* to probation revocation proceedings generally. *See* the extensive citation of cases in *Hewett* v. *North Carolina*, 415 F. 2d 1316, 1322 (4th Cir. 1969). In *Hewitt* the court decided that counsel was a necessary component of fundamental fairness at a probation revocation hearing, "the event which makes operative the loss of liberty," because a trained lawyer might have prevented the admission against defendant of improper evidence, and, through appropriate objections, exceptions, and assignments of error, have preserved defendant's right to appeal.

Escalera and *Goldberg* are persuasive recent authority that states may not avoid the rigors of due process by labeling an action which has serious and onerous consequences

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[*] In *Townsend* v. *Burke*, 334 U. S. 736 (1948) the Court had held that an unrepresented defendant was unfairly prejudiced by the sentencing court's reliance on "assumptions concerning his criminal record which were materially untrue."

as a withdrawal of a "privilege" rather than a "right."[31] *Mempa* warns us that procedural formality may be required in the operation of the criminalization and incarceration process beyond the determination of guilt at trial. Thus, we do not doubt that Sostre was entitled to "due process of law" before he was punished for an infraction of prison rules. The exaction of segregated confinement was onerous indeed,[32] and the distinction between a "right" and a "privilege"—or between "liberty" and a "privilege" for that matter—is nowhere more meaningless than behind prison walls.[33] The difficult question, as always, is what process was due. In answering that question, we may not uncritically adopt the holdings of decisions that take color from contexts where the shadings are as different from the instant case as the cases we have discussed:

> [A]s a generalization, it can be said that due process embodies the differing rules of fair play, which through the years, have become associated with differing types of proceedings. Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account.

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[31] See *Shapiro* v. *Thompson*, 394 U. S. 618, 627 n. 6 (1969); *Sherbert* v. *Verner*, 374 U. S. 398 (1963); *Speiser* v. *Randall*, 357 U. S. 513 (1958); *Slochower* v. *Bd. of Educ.*, 350 U. S. 551 (1956). See generally, *Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 *Harv. L. Rev.* 1439 (1968).

[32] Cf. *Coffin* v. *Reichard*, 143 F. 2d 443, 445 (6th Cir. 1944) (prisoner entitled to writ of habeas corpus if deprived of right which makes imprisonment more burdensome than law allows).

[33] See Note, The Supreme Court, 1968 Term, 83 *Harv. L. Rev.* 193, 197 (1969).

Appendix A.

Hannah v. *Larche*, 363 U. S. 420, 442 (1960).

> Beyond the process of guilt determination and initial incarceration, courts have displayed greater reluctance to import all the trappings of formal due process. Thus, a panel of this court has recently held that formal trial-type due process is not a requirement in connection with a parole *release* determination. *Menechino* v. *Oswald*, —— F. 2d —— (1970).[34] Like the relationship between Menechino and the parole board, Follette's relation to Sostre should not be viewed as adversarial in the same sense that a criminal trial is adversarial. Certainly, formal rules of evidence would be entirely inappropriate at a disciplinary proceeding. To dispose sensitively and carefully of each prisoner's unique case with due regard for the effect of each decision on the total fabric of the prison community, prison authorities must have wide access to relevant information.[35] Since, in addition, there is no likelihood that substantial rights would be sacrificed if a prisoner failed, for example, to raise a proper objection or to take a timely appeal, the need for legal skills is less acute here than in *Mempa*, *Townsend*, or *Hewett*. Moreover, the evidence as to whether the prisoner has violated a prison regulation is likely to be simpler, more precise, and more readily at hand than, for example, the evidence bearing on the question whether welfare payments should be terminated. There is correspondingly less need for cross-examination and calling of witnesses.
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> Most important, we think it inadvisable for a federal court to pass judgment one way or another as to the truly

[34] Followed in *Lewis* v. *Rockefeller*, —— F.2d —— (Sept. 1, 1970). Cf. *Sperling* v. *Fitzpatrick*, 426 F.2d 1161 (2d Cir. 1970).

[35] For similar reasons the Court in *Williams* v. *New York*, 337 U. S. 241 (1949), found no denial of due process when the appellant was *sentenced* on the basis of "information supplied by witnesses with whom the accused had not been confronted and as to whom he had no opportunity for cross-examination."

decisive consideration, whether formal due process requirements would be likely to help or to hinder in the state's endeavor to preserve order and discipline in its prisons and to return a rehabilitated individual to society. It would be too simplistic to disassociate the impact of punishment meted out after a disciplinary hearing from the method by which the hearing itself is conducted. As one court has observed: "The association between men in correction institutions is closer and more fraught with physical danger and psychological pressures than is almost any other kind of association between human beings." *Edwards* v. *Sard*, 250 F. Supp. 977, 981 (D.D.C. 1966). It is sad but true that the study of the prison subculture by psychologists and sociologists has until recently been largely neglected. Those who have looked into the problem, however, do not gainsay the volatility of relationships among prisoners and prison officials. See, e.g., *Corrections* 46-47; Gibbons, *Changing the Law Breaker* 200-12 (1965). We would not presume to fashion a constitutional harness of nothing more than our guesses. It would be mere speculation for us to decree that the effect of equipping prisoners with more elaborate constitutional weapons against the administration of discipline by prison authorities would be more soothing to the prison atmosphere and rehabilitative of the prisoner or, on the other hand, more disquieting and destructive of remedial ends. This is a judgment entrusted to state officials, not federal judges.[38]

We are particularly unwilling to interfere with state administrative processes when reliable, detailed informa-

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[38] Plaintiff was not systematically denied safeguards afforded non-prisoners prior to a transfer to a different state institution. See *Baxstrom* v. *Herold*, 383 U.S. 107 (1966); *Shone* v. *Maine*, 406 F.2d 844 (1st Cir. 1969); *Bolton* v. *Harris*, 395 F.2d 642 (D.C. Cir. 1968); *Schuster* v. *Herold*, 410 F.2d 1071 (2d Cir.), cert. denied, 396 U.S. 847 (1966). His reliance on those cases is misplaced.

tion or empirical studies are as scanty as they are on the subject of prison disciplinary procedures. See *Corrections* at 16; *D. Glaser, The Effectiveness of a Prison and Parole System* 172 (1964) ("prison discipline . . . has not received extensive objective research by anyone"). Judge Learned Hand wisely instructed us, "[c]onstitutions are deliberately made difficult of amendment; mistaken readings of them cannot easily be corrected. Moreover, if they could be, constitutions must not degenerate into *code inventums* or codes; when they begin to do so, it is a sign of a community unsure of itself and seeking protection against its own misgivings." *The Spirit of Liberty* 179 (1952).

Analogies and recommendations called to our attention do not go far to advance Sostre's position. Neither the Model Penal Code nor the Manual of the American Correctional Association would require confrontation and cross-examination, calling of witnesses by the prisoner, counsel or counsel substitute, or a written statement of evidence and rationale.[37] Similarly, Rhode Island has voluntarily adopted new disciplinary procedures for its prisons, under court supervision, *Morris* v. *Travisono*, 310 F. Supp. 857 (D.R.I. 1970), which include provisions for a hearing, advance written notice, and assistance by a prison officer, but no other of the formal safeguards required by Judge Motley's injunction. Sostre has referred us to rules adopted for the Missouri State Penitentiary, under which prisoners are assisted during a disciplinary proceeding by

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[37] See *American Law Institute, Model Penal Code* § 304.7 (2) (Proposed Official Draft 1962) (before inflicting punishment, warden to be advised by disciplinary committee after "hearing" where prisoner would appear after receiving notice of charges); American Correctional Ass'n, *Manual* 409 (expeditious hearing, adequate investigation, regular channel for appeal, written report of the infraction found and disposition).

a member of the prison staff and where there must be a written summary of the disciplinary proceeding, including a statement of relevant evidence. *Personnel Information Pamphlet: Rules and Procedures* 3-4 (Sept. 1967). Again, however, there is no provision for calling witnesses or cross-examination.

Indeed, it appears that, among those practices known to us, only in the federal correctional system must a formal proceeding, including each of the elements in the district court's mandate, precede *forfeiture* of good time allowances. *Bureau of Prisons, Policy Statement: Withholding, Forfeiture, and Restoration of Good Time* (No. 7400.6 Dec. 1, 1966). Notably, however, these formalities need *not* accompany discipline that results in the *withholding* of good time credit, as Judge Motley would require.

We therefore find ourselves in disagreement with Judge Motley's conclusion that each of the procedural elements incorporated in her mandatory injunction are necessary constitutional ingredients of every proceeding resulting in serious discipline of a prisoner. In thus rejecting Judge Motley's conclusions, however,[35] we are not to be understood as disapproving the judgment of many courts that our constitutional scheme does not contemplate that society may commit lawbreakers to the capricious and arbitrary

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[35] Accord, *Burns* v. *Swenson*, —— F.2d —— (8th Cir. August 31, 1970). Plaintiff, an inmate of the Missouri State Penitentiary, was summarily committed, without a prior hearing, to segregated confinement that was to last more than three years. An investigative report was not filed until more than a month after Burns's confinement. At review hearings held six months after he was committed, and again shortly before his release, Burns appeared but did not confront adverse witnesses, was not assisted, and apparently was not permitted to present evidence. The court found no due process violation.

actions of prison officials.[39] If substantial deprivations are to be visited upon a prisoner, it is wise that such action should at least be premised on facts rationally determined. This is not a concept without meaning. In most cases it would probably be difficult to find an inquiry minimally fair and rational unless the prisoner were confronted with the accusation, informed of the evidence against him, see *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965); *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), and afforded a reasonable opportunity to explain his actions.[40] See *Nolan* v. *Scafati*, 306 F. Supp. 1 (D. Mass. 1969) (Wyzanski, *J.*).[41] See also, *Shelton* v. *Board of Parole*, 388 F.2d 567, 576 (D.C. Cir. 1967) (en banc). Cf. *Thompson* v. *Louisville*, 362 U.S. 199 (1960) (conviction supported by no evidence violates due process); *U. S. ex rel. Campbell* v. *Pate*,

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[39] "A first tenet of our governmental, religious, and ethical tradition is the intrinsic worth of every individual, no matter how degenerate. It is a radical departure from that tradition to subject a defined class of persons, even criminals, to a regime in which their right to liberty is determined by officials wholly unaccountable in the exercise of their power. . . ." *Corrections* 83. See *Hirschkop & Mulemann, The Unconstitutionality of Prison Life*, 55 *Va. L. Rev.* 795, 834 (1969) (discipline should be based on "proven facts" and should be "rationally related to the objective sought").

[40] The Court in *Escoe* v. *Zerbst*, 295 U.S. 490, 493 (1935) (Cardozo, *J.*) interpreting the federal probation law, adopted a similarly flexible solution: "Clearly the end and aim of an appearance before the court must be to enable an accused probationer to explain away the accusation. . . . This does not mean that he may insist upon a trial in any strict sense. . . . It does mean that there shall be an inquiry so fitted in its range to the needs of the occasion as to justify the conclusion that discretion has not been abused by the failure of the inquisitor to carry the probe deeper."

[41] On appeal, the order of the district court dismissing the complaint in *Nolan* was reversed with instructions to take evidence to determine whether *any* "assurances of elemental fairness" had in fact been afforded in the disciplinary action that was the object of plaintiff's suit. —— F.2d —— (Aug. 14, 1970).

401 F.2d 55, 57 (7th Cir. 1968) ("the relevant facts . . . must not be . . . capriciously or unreliably determined"); *Dunn* v. *California Dept. of Corrections*, 400 F.2d 340, 342 (9th Cir. 1968); *Williams* v. *Patterson*, 389 F.2d 374 (10th Cir. 1968); *Howard* v. *Smyth*, 365 F.2d 428 (4th Cir.) *cert. denied*, 385 U.S. 988 (1966) (arbitrary and serious punishment of activities closely related to first amendment freedoms); *Jones* v. *Rivers*, 338 F.2d 862, 874 (4th Cir. 1964); *Hyser* v. *Reed*, *supra*, 318 F.2d at 242 (basic fairness requires that federal parole not be revoked arbitrarily); *U. S. ex rel. Wakeley* v. *Pennsylvania*, 247 F. Supp. 7, 12 (E.D. Pa. 1965) (courts in these cases must locate the "line that separates mere matters of discipline from arbitrary and capricious disregard of human rights").[42]

VII:

Rights of Communication and Expression

A. *Correspondence*

The distaste with which some observers view prolonged segregated confinement attaches as well to that kind of isolation flowing from restrictions on and censorship of prisoners' correspondence:

> The harm censorship does to rehabilitation cannot be gainsaid. Inmates lose contact with the outside world and become wary of placing intimate thoughts

[42] Defendants have appended to their brief on appeal new rules and regulations recently promulgated by the New York Department of Correction and effective October 19, 1970, governing, among other things, prisoner discipline in all state correctional institutions which appear to provide some new procedural safeguards. We consider it inappropriate to comment on the constitutional adequacy of the new procedures for they were adopted after the events before us on this appeal.

or criticisms of the prison in letters. The artificial increase of alienation from society is ill advised.[43]

The values commonly associated with free expression—an open, democratic marketplace of ideas, the self-development of individuals through self-expression, the alleviation of tensions by their release in harsh words rather than hurled objects—these values that we esteem in a free society do not turn to dross in an unfree one. "Letter writing keeps the inmate in contact with the outside world, helps to hold in check some of the morbidity and hopelessness produced by prison life and isolation, stimulates his more natural and human impulses, and otherwise may make contributions to better mental attitudes and reformation." *Palmigiano* v. *Travisono*, — F. Supp. — (D.R.I. Aug. 24, 1970). Suppression of diversity and dissenting views is probably not less apt in a prison than elsewhere to hasten the stagnation and bureaucratization of the institution that indulges in it. See *T. Emerson, Toward a General Theory of the First Amendment* 3-15 (1966).

Whatever wisdom there might be in such reflection, we cannot say with requisite certitude that the traditional and common practice of prisons in imposing many kinds of controls on the correspondence of inmates, lacks support in any rational and constitutionally acceptable concept of a prison system. See *McCloskey* v. *Maryland*, 337 F.2d 72, 74-75 (4th Cir. 1964) ("Control of the mail to and from inmates is an essential adjunct of prison administration"). See also, *Diehl* v. *Wainwright*, 419 F.2d 1309 (5th Cir. 1970); *Abernathy* v. *Cunningham*, 393 F.2d 775 (4th Cir. 1968); *United States* v. *Stahl*, 393 F.2d 101 (7th Cir.) *cert. denied*, 393 U.S. 879 (1968); *Carey* v. *Settle*, 351 F.2d 483.

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[43] Singer, *Censorship of Prisoners' Mail and the Constitution*, 56 *A.B.A.J.* 1051 (1970).

485 (2d Cir. 1965).[2] We note that Sostre did not contest the validity of Warden Follette's action in striking the name of his sister from the list of Sostre's authorized correspondents after it was learned that he was using letters addressed to his sister as vehicles for unauthorized correspondence. See fn. 4, *supra*. "Discipline and prison order are sufficient interests to justify such regulation incidental to the control of prisoners' speech. *See Karess v. Cooper*, 338 U.S. 177 (1949); Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 Harv. L. Rev. 1, 11 (1965).

Sostre's position in both logic and the case law, however, are letters addressed to courts, public officials, or attorneys when a prisoner challenges the legality of either his criminal conviction or the conditions of his incarceration. See, e.g., *Johnson v. Avery*, 393 U.S. 483 (1969); *Cochran v. Kansas*, 316 U.S. 255 (1942); *Ex parte Hull*, 312 U.S. 546 (1941); *Collenga v. Peyton*, 362 F.2d 905, 907 (4th Cir. 1966) (no censorship permitted of mail between inmate and court with jurisdiction to hear prisoner's complaints); *Nolan v. Maryland*, *supra*; *Stillner v. Rhay*, 322 F.2d 314, 316 (9th Cir.), *cert. denied*, 376 U.S. 920 (1963) ("[u]nimpeded access to the courts is basic to all other rights protected by" the Civil Rights Act). It would be inappropriate on constitutional grounds, ironic, and irrational to permit drastic curtailment of constitutional rights in the name of punishment and rehabilitation, while denying prisoners a full opportunity to pursue their appeals and post-conviction remedies. The enormous scope of discretion ac-

[2] "Restrictions on the extent and character of prisoners' correspondence and examination or censorship in relation thereto have always been regarded as inherent incidents in the conduct of penal institutions, and the control of confinements, activities, preoccupations, and other relationships therein." *Lee v. Tahash*, 352 F.2d 970, 971 (8th Cir. 1965).

cordial prison authorities also heightens the importance of permitting free and uninhibited access by prisoners to both administrative and judicial forums for the purpose of seeking redress of grievances against state officers. The importance of these rights of access suggests the need for guidelines both generous and specific enough to afford protection against the reality or the chilling threat of administrative infringement.

Thus, we do not believe it would unnecessarily hamper prison administration to forbid prison authorities to delete material from, withhold, or refuse to mail a communication between an inmate and his attorney; see *Burns v. Swenson*, —— F.2d —— (8th Cir. Aug. 31, 1970) (protecting correspondence with the ACLU, or any court, or any public official, unless it can be demonstrated that a prisoner has clearly abused his rights of access. Obviously, the transmittal of contraband or laying plans for some unlawful scheme would constitute such an abuse. In addition, if it were clear that a prisoner's recitation of complaints about his confinement in otherwise protected correspondence were a mere pretext to accomplish his sole motivating purpose of communicating instead about restricted matters, then prison officials may block the inmate's scheme by deleting that portion of such a communication unrelated to the complaints. See *Carothers v. Follette*, —— F. Supp. —— (S.D.N.Y. filed July 15, 1970); *In re Ferguson*, 55 Calif. 2d 663, 361 P.2d 417, *cert. denied* sub nom. *Ferguson v. Heinze*, 368 U.S. 864 (1961). In such a case, the need to restrain the abuse outweighs the danger that prison authorities may by inadvertence or design hamper the prisoner's access.

On the other hand, if a communication is properly intended to advance a prisoner's effort to secure redress for alleged abuses, no interest would justify deleting material thought by prison authorities to be irrelevant to

the prisoner's complaints. The danger that an official will improperly substitute his judgment for that of the correspondent's then preponderates. For similar reasons, prison officials may not withhold, refuse to mail, or delete material from otherwise protected communications merely because they believe the allegations to be repetitious, false, or malicious. *See Nolan* v. *Scafati*, —— F.2d —— (1st Cir. 1970) (absent some countervailing interest other than that prisoner's letter contained "lies," authorities may not prevent inmate from seeking legal assistance); *Eglewood* v. *Cloninger*, 206 F. Supp. 370, 377 (D.D.C. 1962) (right to seek redress of grievances was abridged by punishment for alleged false accusations about prison conditions in prisoner's letter of complaint to public officials).

Accordingly, we agree with Judge Motley that it was improper for Warden Follette to delete material from correspondence between Sostre and his attorney merely because Follette thought the material irrelevant to Sostre's appeal of his conviction. We believe it was also improper for Follette to refuse to mail a letter of complaint to the Postal Inspector. We leave a more precise delineation of the boundaries of this protection for future cases. We need only add that when we say there may be cases which will present special circumstances that *would* justify deleting material from, withholding, or refusing to mail communications with courts, attorneys, and public officials, we necessarily rule that prison officials may open and read all outgoing and incoming correspondence to and from prisoners.

B. Prisoner Legal Aid

Johnson v. *Avery*, 393 U.S. 483 (1969), instructs that states must permit prisoners to help fellow inmates prepare habeas corpus petitions, subject to reasonable regulation, absent a sufficient showing by the state that through

some other means it provides prisoners with an adequate substitute for the "jailhouse lawyer." Cf. *Ex parte Hull*, 312 U.S. 546 (1941) (state may not require that habeas petition be approved by a corrections official to see that it was "properly drawn"); *Gilmore v. Lynch*, —— F. Supp. —— (N.D. Calif., filed May 28, 1970) (3-judge court) (woefully inadequate prison law library *held* unlawfully restricts prisoners' access to courts). The failure of any such showing in this case makes it mandatory that New York permit prisoner aid to the extent required by *Johnson*. *Johnson's* explicit permission to states reasonably to regulate this right, however, validates the Green Haven rule requiring prisoners to apply to the Warden for permission to help other inmates with legal activities. There would be a violation of *Johnson* only if the Warden denied permission, or if the conditions on which he granted it were unreasonable.[*]

Since Sostre never requested permission, there is no cause for an injunction to enforce the *Johnson* rule. We assume that permission would be granted as a matter of course, subject only to reasonable conditions. Nor can we consider unreasonable the Green Haven rule forbidding prisoners from sharing their personal law books with one another. This regulation would not prohibit Sostre, for example, from recommending legal source material to other inmates. We do not see how they would be unduly burdened by being required to acquire the books through

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[*] Nor does *Johnson* sanction inter-prison legal aid among prisoners. Some slight incremental value might be discerned were the right to access to courts extended so as to embrace a right to the aid of jailhouse lawyers wherever they might be incarcerated. Any gain, however would be outweighed by the consequential added interference with prison discipline and the danger that more aggressive prisoners would abuse their expanded power. A co-defendant stands in no better position than any other jailhouse lawyer in this respect.

prison officials[5] rather than directly from Sostre. See *Gilmore v. Lynch*, *supra* (upholding prison rule prohibiting jailhouse lawyers from keeping in their cells legal material pertaining to other prisoners). In a closely related situation, we held that a prisoner could be refused permission to keep "law books" in his cell where there was no allegation he was denied use of the prison library. *Williams v. Wilkins*, 315 F.2d 397 (2d Cir. 1963). We cannot ignore the concern of prison officials that strong-willed inmates might exact hidden and perhaps non-monetary fees in return for nominally free privileges at the inmates' private lending library.[6]

C. Possession of Literature and Mere Expression of Beliefs

Our holding that prisoners may not be punished for their beliefs carries the necessary corollary that we may not permit punishment for the mere expression of those beliefs. One can hardly speak of beliefs apart from their expression, cf. *Fulwood v. Clemmer*, 206 F. Supp. 370 (D.D.C. 1962). In the absence of arbitrariness or discrimination, see *Jackson v. Godwin*, 400 F.2d 529 (5th Cir. 1968); *Rivers v. Royster*, 360 F.2d 592 (4th Cir. 1966); *Sewell v. Pegelow*, 291 F.2d 233 (2d Cir. 1961), we do not say on this record that Warden Follette would have exceeded his legitimate

[5] Thus, legal material might be acquired either from the prison library through the prisoner's own outside sources, or even from Sostre himself with prior approval of prison officials.

[6] The authoritarian "boss" inmate is no chimera. See *Corrections*. The Court in *Johnson v. Avery*, 393 U. S. 483, 488 (1969), recognized that prison writ writers might occasionally menace prison discipline. See also *Hatfield v. Bailleaux*, 290 F.2d 632, 639 (9th Cir. 1961), cert. denied, 368 U.S. 862 (1961) (testimony of prison officials that rules restricting access to law books were designed to forestall aggressive inmates from dominating weaker ones).

authority if he had confiscated the writings that guards found in Sostre's cell following his release from segregation. Whatever doubts we might have as to the wisdom of seizing an inmate's political writings, we would not lightly overturn a warden's judgment that possession of the writings might subvert prison discipline if there existed the risk of their circulation among other prisoners."

However, Sostre was *punished* simply for putting his thoughts on paper, with no prior warning and no hint that he intended to spirit the writings outside his cell. To sanction such punishment, even though in the judgment of prison officials the writings were "inflammatory" and "racist," as in the instant case, would permit prison authorities to manipulate and crush thoughts under the guise of regulation. The intimidating threat of future similar punishment would chill a wide range of prisoner expression, not limited to that expression which Follette might in fact deem dangerous enough to discipline. The danger of undetected discriminatory punishment of ideas is particularly acute in the absence of statutory standards to guide the exercise of Follette's discretion. *See, e.g., Cox* v. *Louisiana*, 379 U.S. 536, 556-57 (1965); *Schneider* v. *State*, 308 U.S. 147 (1939). Any real threat to prison security that Sostre's possession of his writings might have posed could have been met by confiscation rather than punishment. *See Shelton* v. *Tucker*, 364 U.S. 479 (1960).

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[7] A case of suppression would, however, require us to decide the relevance of such doctrines as the "clear and present danger test" that courts have relied upon in other contexts to decide the validity of restraints operating directly upon the content of speech. *See Schenck* v. *United States*, 249 U.S. 47 (1919); *Long* v. *Parker*, 390 F.2d 816, 822 (3rd Cir. 1968) ("[t]o justify the prohibition of religious literature, the prison officials must prove that the literature creates a clear and present danger of . . . some . . . substantial interference with the orderly functioning of the institution"); *Knuckles* v. *Prasse*, 302 F. Supp. 1936 (E.D. Pa. 1966); *Banks* v. *Haynes*, 234 F. Supp. 27 (E.D. Va. 1964).

Appendix A:

VIII.

Conclusion

Because of the nature of this case, the multitude and complexity of claims raised and the extent of Judge Motley's considered opinion and the injunctive and other relief granted, we have been compelled to engage in this protracted exegesis. In light of what we have set forth our conclusions follow.

A. Injunctive

1. Although not necessary to the disposition of Sostre's complaint, the district court held that several elements of trial-type procedure, enumerated in its order, were required by due process in every instance of prisoner discipline resulting in witholding of good time credit to the prisoner or loss of his opportunity to earn good time. Because of the importance of the question to the state of New York, and the frequency with which similar questions are being litigated in district courts of this jurisdiction, we are compelled to say that the district court was in error. All of the elements of due process recited by the district court are not necessary to the constitutionality of every disciplinary action taken against a prisoner. In light of this, we reverse the district court insofar as it enjoined defendants and others from so disciplining Sostre that he loses accrued good time credit or is unable to earn good time credit without full compliance with all the procedural steps set forth in Judge Motley's injunction. We do not thereby imply that discipline in New York prisons may be administered arbitrarily or capriciously. We would not lightly condone the absence of such basic safeguards against arbitrariness as adequate notice, an opportunity for the prisoner to reply to charges lodged against him, and a reasonable investigation into the relavant facts—at

least in cases of substantial discipline. However, as consideration of Sostre's case does not properly raise any question whether New York prisons regularly or systematically ignore minimal due process requirements, we must reverse the order of the district court that defendants submit for its approval, proposed rules and regulations governing future disciplinary actions. In this connection, we note that New York State has recently promulgated rules and regulations governing prison discipline which appear to give inmates new procedural protections.[49]

2. The refusal to mail Sostre's letter to the Post Office Inspector, complaining of prison practices, clearly infringed Sostre's Fourteenth Amendment rights. We also affirm Judge Motley's order insofar as it enjoins defendants Follette and McGinnis, their employees, agents, successors, and all persons in active concert and participation with them, from deleting material from, refusing to mail or refusing to give to Sostre: (1) Any communication between Sostre and the following—(a) any court; (b) any public official or agency; or (c) any lawyer—with respect to either his criminal conviction or any complaint he may have concerning the administration of the prison where he is incarcerated. We reverse, however, insofar as Judge Motley enjoined nonarbitrary restraint of communication between Sostre and his co-defendant in the criminal matter pending against him.

3. There is no cause for an injunction to enforce the principles announced in *Johnson* v. *Avery*, *supra*, since no infractions of those principles have been shown. *Johnson* v. *Avery* permitted reasonable rules regulating the conduct of inmates in assisting other inmates in legal proceedings. Sostre has not proved that the rules regulating

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[49] See note 42, *supra*.

his right to assist other prisoners in their legal affairs were unreasonable and that his punishment was for violating such rules. Therefore, we must reverse the district court insofar as it enjoined interferences with Sostre's translation of letters of fellow-inmates since he had failed to comply with the rule requiring that he seek permission of the warden. For the same reason, we reverse the injunction against punishing Sostre for sharing with other inmates his law books, law reviews, and other legal materials, and from refusing to permit Sostre to assist any other inmate in any legal matter.

4. We have held that Sostre was improperly punished for possession of constitutionally protected literature. We perceive no reason, however, to set *political* speech apart from other kinds of constitutionally protected speech. We therefore modify the district court order so as to enjoin defendants Follette and McGinnis, their employees, agents, successors, and all persons in active concert and participation with them, from punishing Sostre for having literature in his possession and for setting forth his views orally or in writing, except for violation of reasonable regulations. We do not hereby enjoin officials from taking reasonable measures to prevent prisoners from inciting disturbances and otherwise to protect the security and order of New York prisons, consistent with prisoners' rights to freedom of expression. Also we do not believe that there is any need for the extraordinary procedure requiring defendants to submit rules and regulations governing the receipt, distribution, discussion and writing of political literature for the approval of the district court.

5. We have no reason to conclude that New York prison officials will not abide by the constitutional rights of prisoners as we define them today. We have refused to set

aside Judge Motley's findings that Warden Follette unlawfully committed Sostre to segregated confinement because of his legal activities and beliefs. Warden Follette, however, is deceased and we perceive no threat that others will duplicate his improper conduct. Accordingly, we vacate that portion of the district court order which enjoined defendants and others from returning Sostre to punitive segregation for charges previously preferred against him.

B. *Good Time Credit*

Since we have held that Sostre was unlawfully confined to punitive segregation on account of his political beliefs and legal activities, we agree with Judge Motley's order requiring Sostre to be credited with 124⅓ days of earned "good time." Sostre may not be penalized because of his time in segregation by remaining incarcerated longer or by becoming eligible for parole later than he otherwise would. We do not consider the argument that Sostre may not have earned the credit even if he had remained in the general population to be of substance. Whether he would or would not have earned it is pure speculation. Since Sostre's constitutional rights have been violated, we resolve the doubt in his favor. Moreover, this is the only feasible way to ensure that Sostre is not again unlawfully penalized by arbitrary action.[50]

C. *Money Damages*

All parties seem to agree upon two principles with which we also are in accord. First, Section 1983 authorizes recovery of compensatory, and, in an appropriate case, puni-

[50] In granting this relief to Sostre, we do not resolve the question whether a claim for relief grounded solely on the contention that good time credit was unconstitutionally withheld or forfeited would, standing alone, support an action under 42 U.S.C. § 1983, without compliance with the exhaustion requirement of 28 U.S.C. § 2254(b), (c). See p. 5a, *supra*.

tive damages against an individual for the unjustifiable violation of constitutional rights "under color" of state law. *Monroe* v. *Pape*, 365 U.S. 167 (1961); *Basista* v. *Weir*, 340 F.2d 74 (3rd Cir. 1965). This liability, however, is entirely personal in nature intended to be satisfied out of the individual's own pocket. Moreover, the doctrine of sovereign immunity, as codified by the Eleventh Amendment, bars the exaction of a fine from a state treasury without the state's consent, at least on account of tortious actions committed by its agents under the circumstances of this case. *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682 (1949); *Westberry* v. *Fisher*, 309 F. Supp. 12 (D. Me. 1970).

It follows from these principles[51] that although Sostre was entitled to compensatory damages against Warden Follette,[52] Follette's successor as warden, who had no part whatsoever in Follette's wrongful conduct against Sostre, incurred no personal money responsibility upon Follette's death. We note also that no application was made in the court below to substitute any party who could be held responsible to assume Follette's obligation to Sostre, Rule 25, F. R. Civ. P., if such a party existed. Accordingly, there is no party before us against whom appropriately to award damages.[53]

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[51] As state administrative officials, defendants are not entitled to the protective immunity from a judgment for damages that has been extended to judges, *Pierson* v. *Ray*, 386 U.S. 547 (1967), and legislators (*Tenney* v. *Brandhove*, 341 U.S. 367 (1951). *Johson* v. *Hemne*, 355 F.2d 129 (2d Cir. 1966).

[52] Judge Motley awarded $25.00 compensatory damages per day for every day that Sostre spent in segregation (372 days) or a total of $9,300. In view of the conditions of Sostre's segregation, which we have described, this amount is not unreasonable. In addition, she awarded $3,270 in punitive damages.

[53] We do not now decide the question, not passed on below and neither briefed nor argued orally on this appeal, whether plaintiff may yet recover damages against a party not before us.

Appendix A.

In any event, we are persuaded to reverse the award of *punitive* damages. Warden Folletté's improper conduct in segregating Sostre so far as appears reflected no pattern of such behavior by himself or by other officials. The deterrent impact of a punitive award would be of minimal use. *See Green v. Wolf Corp.*, 406 F.2d 291, 303 (2d Cir. 1968), *cert. denied* sub nom. *Troster, Singer & Co. v. Green*, 395 U.S. 977 (1969).

It is appropriate, lest our action today be misunderstood, that we disclaim any intent by this decision to condone, ignore, or discount the deplorable and counter-productive conditions of many of this country's jails and prisons. We strongly suspect that many traditional and still widespread penal practices, including some which we have touched on in this case, take an enormous toll, not just of the prisoner who must tolerate them at whatever price to his humanity and prospects for a normal future life, but also of the society where prisoners return angry and resentful. Nevertheless, we would forget at our peril and at the peril of our free governmental process, that we are federal judges reviewing decisions made in due course by officers of a sovereign state. We have interpreted and applied the law as it appears to us in light of temporary circumstances and enduring principle. We do not doubt the magnitude of the task ahead before our correctional systems become acceptable and effective from a correctional, social and humane viewpoint, but the proper tools for the job do not lie with a remote federal court. The sensitivity to local nuance, opportunity for daily perserverance, and the human and monetary resources required lie rather with legislators, executives, and citizens in their communities. *See, Amsterdam, The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 *N.Y.U.L.Rev.* 785, 810 (1970).

We wish to express our appreciation to Sostre's appointed counsel, Victor Rabinowitz, Kristin Booth Glen and David Rosenberg, for their thorough and excellent presentation of this appeal.

LUMBARD, *Chief Judge* (concurring):

I concur in Judge Kaufman's thorough opinion except as to Section VI regarding Procedural Due Process. While I agree in reversing those provisions of paragraph 2 of the order of the district court, I see no need to express any opinion on what the New York State authorities should do when determining whether or not to withhold or withdraw good time credit, or the general principles which should govern such situations.

WATERMAN, *Circuit Judge* (concurring):

I concur in each of the results reached in the majority opinion. Nevertheless, I am concerned that the discussion there with reference to Due Process rights of a state prisoner who is threatened with loss of good time credit or with a loss of the chance to earn such credit because of an alleged infraction of prison rules would seem inaccurately to portray the obligation of a federal court asked to "interfere with state administrative processes" on constitutional grounds. I submit that it is our duty, mandated by the U. S. Constitution, authorized by Congress,[1] and demanded by conscience, to strike down any practice sanctioned by a State which does not conform to at least minimally acceptable levels of due process. The court, aptly noting that appellant has asked us to determine what process is constitutionally due him, a convicted and imprisoned felon, declines to determine the "truly decisive issue" because it lacks empiric information.[2] While I most

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[1] See, e.g., 42 U.S.C. § 1983.

[2] It may be that despite this disclaimer in the majority opinion we have in fact decided that minimum standards are not met if the prisoner is not at least confronted with an accusation, informed of the evidence against him, and is afforded a reasonable opportunity to explain his actions. See pp. 32a, 37a, 46a-47a, *supra*. However, it does seem clear that decision as to what are wholly acceptable minimum standards is left for another day through case-by-case development.

assuredly agree that studies and surveys and the presentation thereof to us might provide further information of value in balancing competing interests, their absence should never mean that the federal courts will ignore or condone state activity obviously violative of individual rights when that activity is indulged in under the guise of preserving order.

SMITH, *Circuit Judge* (concurring in part and dissenting in part):

I agree with most of Judge Kaufman's thoughtful and thorough opinion, but disagree in two respects and therefore dissent in part.

I agree with Judge Feinberg that the district court's finding that Sostre's segregation for more than one year was cruel and unusual punishment is supported by the record. Punishment of a nature found likely to bring about an inmate's insanity should be proscribed whether or not it is shown to have succeeded in doing so in the particular case, and whether or not it could be alleviated by "submission."

This requires also, it seems to me, that recovery against McGinnis be upheld. The court found (and Judge Kaufman's opinion emphasizes, page 4a and page 20a) that McGinnis had been fully informed as to Sostre's long segregation, a finding supported by the Follette deposition testimony and exhibits, and had done nothing to terminate it although empowered to do so, and although he knew Follette had kept men in segregation for periods as long as four and five years in the past. Follette was liable in damages to Sostre for violation of his civil rights, and I would rule that McGinnis was properly held also liable. I would not, however, assess exemplary in addition to compensatory damages against McGinnis under these circumstances.

Appendix A.

FEINBERG, *Circuit Judge* (dissenting and concurring):

Because I agree with most of the exhaustive majority opinion, I regret that I find it necessary to dissent from the treatment of the cruel and unusual punishment point and from the reversal as to defendant McGinnis. As to the former, the majority opinion reaches three results, from each of which I dissent. The most important of these is the refusal to hold that there must be a definite limit on how long a prisoner may be kept in punitive segregation, or solitary confinement.[1] The majority holds that for "serious" offenses, the Constitution requires no limit so long as the prisoner has the option of submitting to prison discipline. Second, the majority holds that Sostre's alleged offenses considered together would have been "serious," if Warden Follette had acted for proper motives. Third, even though the warden's motives were "improper," the majority refuses to rule that Sostre's punishment was cruel and unusual.

Before considering these three aspects of the majority opinion, it must be emphasized that Sostre was segregated for over a year and, as Judge Motley noted, would in all likelihood still be effectively isolated but for the intervention of the district court. "There is an intimation in the majority opinion that Sostre was not effectively cut off from usual day to day contact with other human beings,[2] but the district judge's opinion makes clear that he was. The

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[1] See, e.g., "[W]e cannot agree [that the conditions Sostre endured] require that similar punishments be limited in the future to any particular length of time," p. 24a, *supra;* "[T]he Eighth Amendment [does not forbid] indefinite confinement under the conditions endured by Sostre for all the reasons asserted by Warden Follette until such time as the prisoner agrees to abide by prison rules," p. 1663, *supra.*

[2] "[H]e was not as isolated in his segregation as 'solitary' would imply," see p. 5a, *supra.*

district judge and the majority both agree that "the crux of the matter is human isolation," and the district court opinion sets forth in melancholy detail the conditions that were imposed upon Sostre and the reasons why. I will not repeat them here except to note that the full vindictive flavor of defendants' treatment of Sostre is indicated by one incident, relegated to a footnote in the majority opinion. The day after Judge Motley ordered Sostre's release from over a year of segregation, he was again disciplined for having "dust on his cell bars." This caused him to miss the regular July 4th celebration, which would have brought him in contact with prisoners from another part of the prison, such contact being permitted only once a year on July 4. Judge Motley found that the punishment was imposed upon Sostre in retaliation for his legal success before her.

The district judge found that the isolation imposed on Sostre was "dangerous to the maintenance of sanity" and "'could only serve to destroy completely the spirit and undermine the sanity of the prisoner.'" 312 F. Supp. 863, 868, 871 (S.D.N.Y. 1970), quoting *Wright* v. *McMann*, 387 F.2d 519, 526 (2d Cir. 1967). This was a finding of fact. The judge also concluded as a matter of law that "subjecting a prisoner to the demonstrated risk of the loss of his sanity as punishment for any offense in prison is plainly cruel and unusual punishment as judged by the present standards of decency." *Id.* at 871. The majority opinion does not make explicit whether it overrules the judge's finding of fact, although it hints that it does.[3] But in order to reverse the district court on this issue the majority must hold either that Judge Motley's finding of fact is clearly erroneous or that, even if true, the punishment imposed on Sostre did not amount to cruel and unusual punishment as a matter of law. Neither holding would be justified.

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[3] See p. 10a, *supra*.

As to the first, it is difficult to see how Judge Motley's factual finding that Sostre's isolation threatened sanity could be characterized as clearly erroneous. Testimony at trial from experts with impressive credentials clearly supported that finding. Dr. Halleck, in response to a hypothetical question outlining the conditions of Sostre's punishment, stated that they could undermine the prisoner's sanity. Sol Rubin supported that view. It is true that Dr. Johnston, testifying for the State, disagreed. But while the district judge, as trier of fact, was free to believe the experts for plaintiff or for defendants, we may do neither. The trial judge chose to believe the former, and I do not see how her finding on this evidence can be characterized as clearly erroneous.

On the second assumption, what the majority does is to hold that Sostre's lengthy, unlimited isolation, which was "dangerous" to his sanity, does not violate the eighth amendment. With deference, I disagree. The standard for determining "cruel and unusual punishment" has been expressed in a number of ways, all imprecise; e.g., "the wanton infliction of pain," *Louisiana ex rel. Francis* v. *Resweber*, 329 U.S. 459, 463 (1947); conduct which "shocks the most fundamental instincts of civilized man," *id.* at 473 (dissenting opinion); a method of punishment which violates the "evolving standards of decency that mark the progress of a maturing society," *Trop* v. *Dulles*, 356 U.S. 86, 101 (1958). These notions are, of course, subjective to some extent. What may be safely said is that the amendment prohibits "a hard core of inhuman conduct," see 84 Harv. L. Rev. 456, 457 (1970). There is no doubt, as the majority concedes, that a prisoner is not a constitutional pariah. Were that not the case, there would be no basis for the holding that the first amendment was violated here. But the eighth amendment, no less than the first, protects Sostre.[4] Its command is both spacious and changing.

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[4] Through the due process clause of the fourteenth amendment. See *Robinson* v. *California*, 370 U.S. 600 (1961).

Appendix A.

The fact that solitary confinement for an indefinite period has historically been accepted as a viable instrument of prison discipline does not prevent us from finding that it violates the eighth amendment. What might once have been acceptable does not necessarily determine what is "cruel and unusual" today. Recently, the Eighth Circuit has held that whipping by strap is proscribed, although it had once been a familiar practice. *Jackson* v. *Bishop*, 404 F.2d 571 (8th Cir. 1968). Indeed, this court emphasized only a few years ago that the eighth amendment "is not fastened to the obsolete." See *Wright* v. *McMann, supra*, 387 F.2d at 525, quoting *Weems* v. *United States*, 217 U.S. 349, 378 (1910). In this Orwellian age, punishment that endangers sanity, no less than physical injury by the strap, is prohibited by the Constitution. Indeed, we have learned to our sorrow in the last few decades that true inhumanity seeks to destroy the psyche rather than merely the body. The majority opinion emphasizes that after all Sostre could have obtained release from isolation at any time by agreeing to abide by the rules and to cooperate. Perhaps that is so, but that does not change the case. That response could be made were a prisoner kept in solitary for two years instead of one, or for five years, or for ten, or more. The possibility of endless solitary confinement is still there, unless the prisoner "gives in." The same observation could be made if Sostre were tortured until he so agreed, but no one would argue that torture is therefore permitted. The point is that the means used to exact submission must be constitutionally acceptable, and the threat of virtually endless isolation that endangers sanity is not.

The crucial holding of the majority opinion is the refusal to put any limit upon the period of solitary confinement. It is the unusual duration and the open-ended nature of the isolation that the district could and the experts regarded as inflicting the worst psychological harm. Accordingly, as we did in *Wright* v. *McMann, supra*, 387 F.2d at 526, I

would hold that the punishment here, "which could only serve to destroy completely the spirit and undermine the sanity of the prisoner," runs afoul of the eighth amendment.

The second fundamental reason why I differ with the majority opinion stems from the contrast between what it finds necessary to decide and what it refuses to decide. As indicated above, the majority states in an extended dictum that if the warden's motives had been proper, the combined effect of Sostre's alleged violations would have been "serious" enough to justify the harsh punishment he received. Thus, the majority stresses "the seriousness of the multiple offenses charged against Sostre" and expresses "no view as to the constitutionality of such segregated confinement if it had been imposed on account of anyone or any combination of the offenses charged against Sostre other than all of them." But the fact is that two of the allegedly serious "multiple offenses" were Sostre's refusal to desist from preparing legal papers for a co-defendant and his possession of six tables of contents torn from issues of the Harvard Law Review. I would not hold unconstitutional the isolation of an adult prisoner for a sharply limited period as punishment for a serious breach of prison discipline, e.g., what the majority calls "a credible threat to the security of the prison," see p. 1665, *supra*. But these two offenses were simply not grave enough to justify the extremely severe punishment visited upon Sostre. Accordingly, the excessiveness of the penalty for these two alleged transgressions would alone violate the eighth amendment's proscription of cruel and unusual punishment, and I would say so.

Finally, while the majority reaches out to decide that Sostre's confinement would have been constitutional under a hypothetical set of facts, it refuses to rule that his punishment was cruel and unusual even though it was actually

meted out for improper reasons. It is true that the majority also leaves open the constitutionality of such "confinement as Sostre experienced," if imposed for "lesser offenses." The inconsistency of this approach is apparent since if such confinement, in the majority's view, could ever be so excessive a penalty as to be unconstitutional, it should be declared so when there was no basis for the confinement at all.

In sum, keeping Sostre in solitary for over a year was "cruel and unusual punishment" because (1) the length and open-ended nature of his confinement threatened sanity; (2) two of the alleged offenses were so minor as to make the penalty constitutionally disproportionate; and (3) the ostensible reasons were a pretext for vindictive action. I also agree with Judge Smith's opinion with regard to defendant McGinnis. For the reasons and to the extent set forth above, I dissent.

HAYS, *Circuit Judge*, dissenting (with whom Judge MOORE concurs):

I dissent from the affirmance of any grant of injunctive relief or damages.

In deciding this case the majority have overlooked two fundamental guiding principles. The first is that although persons serving sentences in prison for crime are not to be denied all constitutional protections, there are significant differences between the constitutional rights such prisoners may assert and the constitutional rights of those who are free from prison restraints. For example, although the majority holds that Sostre is protected by the Constitution in his right orally to set forth his political opinions to his fellow prisoners, it may be that even they

would balk at a claim that the Constitution gave Sostre the right, similar to the right which he would have if he were free, to assemble the inmates and harangue them with revolutionary political doctrines. As the Court of Appeals of the Fourth Circuit said in *McCloskey* v. *Maryland*, 337 F.2d 72, 74 (4th Cir. 1964), persons in prison have "no judicially enforceable right to propagandize within the prison walls . . ." The other fundamental principle which receives short shrift at the hands of the majority is that the federal courts should be extremely hesitant to take over the administration of state prisons. We have said that the federal courts should refuse to interfere with the internal affairs of state prisons except in the most extreme case involving " 'conduct that shocks the conscience' " or where the acts of prison officials are " 'barbarous.' " *Church* v. *Hegstrom*, 416 F.2d 449, 450-51 (2d Cir. 1969) (citations omitted). See also *Wright* v. *McMann*, 387 F.2d 519, 527-28 (2d Cir. 1967) (Lumbard, *Ch. J.*, concurring); *Sostre* v. *McGinnis*, 334 F.2d 906 (2d Cir.), cert. denied, 379 U. S. 892 (1964); *Jackson* v. *Bishop*, 404 F.2d 571, 577 (8th Cir. 1968) (Blackmun, *C.J.*). Correction authorities must have wide discretion in matters of internal prison administration. *Smith* v. *Schneckloth*, 414 F.2d 680, 681 (9th Cir. 1969); *Beard* v. *Lee*, 396 F.2d 749, 751 (5th Cir. 1968); *Lee* v. *Tahash*, 352 F.2d 970, 971-72 (8th Cir. 1965); *McCloskey* v. *Maryland*, *supra* at 74; *Sostre* v. *McGinnis*, *supra* at 908. Their decisions in matters of prison discipline should not be disturbed when they are supported by evidence and do not result in shocking deprivations of fundamental human rights. See *Wright* v. *McMann*, *supra*.

In the present case Warden Follette testified that Sostre's punishment was based upon (1) defiance of Follette's order to desist from preparing legal papers, (2) re-

fusal to answer proper questions,[1] (3) statements about his impending liberation, and (4) possession of several items of contraband in his cell. Sostre did not even deny the truth of the first three of these accusations and the fourth was supported by ample evidence. Nevertheless Judge Motley disregarded Follette's findings and testimony and found that Sostre was not punished for any of these infractions.

Observance of the correct legal principles would lead in this case to reversing the trial court with respect to all relief granted.

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[1] In order to maintain discipline prison inmates may be required to answer questions fully and completely. See *United States ex rel. Sperling* v. *Fitzgerald*, 426 F.2d 1161, 1165 (2d Cir. 1970) (Lumbard, *Ch. J.*, concurring).

Appendix B.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

68 Civil 4058

MARTIN SOSTRE,

Plaintiff,

against

NELSON A. ROCKEFELLER, Governor of the State of New York, PAUL D. McGINNIS, Commissioner of Correction of the State of New York, VINCENT MANCUSI, Warden of Attica Prison, and HAROLD W. FOLLETTE, Warden of Green Haven Prison,

Defendants.

OPINION AND ORDER DATED MAY 14, 1970*
CONSTANCE BAKER MOTLEY, D.J.

This is a civil rights action, 42 U.S.C. § 1983, 28 U.S.C. § 1343(3), brought by plaintiff, Martin Sostre, an "Afro-American citizen of the United States" and resident of Green Haven Prison against the Governor of New York, the Commissioner of Corrections and the Wardens of two New York State prisons.[1]

Mr. Sostre is no stranger to the New York State prison system, having already served twelve years, 1952-1964, four of which were spent in solitary confinement at Attica State Prison for Black Muslim activity (T. 3, 7, 160-166). He is also no stranger to the federal courts with his civil rights complaints against New York prison officials (T. 4). He secured for Black Muslim prisoners their rights to cer-

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* This opinion is reported at 312 F. Supp. 863.

tain unrestricted religious liberties during his prior incarceration." *Pierce, Sostre, Sa Marion v. La Vallee*, 293 F. 2d 233 (2d Cir. 1961) and *Sostre v. McGinnis*, 334 F. 2d 906 (2d Cir.), *cert. den.*, 379 U. S. 892 (1964). His earlier legal activity also resulted in the elimination of some of the more outrageously inhumane aspects of solitary confinement in some of the state's prisons[2] (T. 163, 167).

Martin Sostre is again in prison. This time he is there pursuant to a sentence of 30-40 years, to be followed by a one year sentence and a sentence of 30 days for contempt of court, imposed upon him by the Supreme Court of New York, Erie County, on March 18, 1968. (Def. Proposed Finding of Fact No. 4 and Exh. A.)

On the day of his sentence, he was immediately taken to Attica Prison where he remained overnight in a cell block which contained no other prisoners (T. 5-6, 157-158). The next morning, he was taken in a "one-man draft" to Green Haven Prison (T. 6, 538). According to the Deputy Warden in charge of Attica (the warden, a defendant here, being on vacation), he sought Sostre's removal from that prison as soon as possible (T. 520). He, therefore, called the office of the Commissioner of Corrections of the State of New York and spoke to the Deputy Commissioner who approved the transfer (T. 520-521; Def. Proposed Finding of Fact No. 11). The Deputy Warden of Attica testified vaguely and without substantiation as follows: "I thought it was best for the interests of the inmate and for the state that this man be transferred to another institution" (T. 521).

Immediately after his arrival at Attica, Sostre began a legal battle for reversal of his conviction. He sought to mail an application for a certificate of reasonable doubt to the state court which he had prepared prior to sentence; but the guard at Attica refused to mail the application (T. 181-182, 638-640).

The next day, Sostre found himself in solitary confinement in Green Haven where he remained for several days (T. 8-9, 11; Pl. Exh. 37 at 2; Def. Proposed Finding of Fact No. 13). He was then permitted to join the general population and to mail his application for a certificate of reasonable doubt (T. 259-260).

However, shortly thereafter, on June 25, 1968, Sostre was back in solitary confinement (now called "punitive segregation" by defendants). He remained in such confinement until July 2, 1969, when he was returned to the general population pursuant to a temporary restraining order issued by this court in the present action, followed by a preliminary injunction. 309 F. Supp. 611 (S.D.N.Y. Sept. 4, 1969). A trial followed upon which were established the facts found herein and upon which the relief granted in this opinion is based.

On June 25, 1968, Sostre placed in the prison mail box for mailing to his attorney a letter with handwritten legal motions and other papers attached. One of these was a motion for change of venue of the trial of his codefendant, Mrs. Geraldine Robinson, who had not yet been tried, from Erie County (Buffalo) (T. 50, 53; Pl. Exh. 17). He was called to the office of defendant Follette, Warden of Green Haven Prison, who had the papers on his desk. The Warden asked Sostre whether he had a license to practice law, to which he replied in the negative (T. 51). The Warden admittedly denied Sostre the right to prepare legal papers for his codefendant, since he was not a licensed attorney, and flatly refused to mail out the motion papers (Def. Proposed Finding of Facts No. 24-25; T. 1240-1241).

At the same time, Warden Follette questioned Sostre about a reference in his letter to his attorney about an organization known as R.N.A. (Republic of New Africa) "because defendant Follette was concerned about a statement in plaintiff's May 19, 1968 letter to his sister" (Def.

Proposed Finding of Fact No. 28; T. 1241-1242; Pl. Exh. 29F). This statement reads:

> "As for me, there is no doubt in my mind whatsoever that I will be out soon, either by having my appeal reversed in the courts or by being liberated by the Universal Forces of Liberation. The fact that the militarists of this country are being defeated in Viet Nam and are already engaged with an escalating rebellion in this country by the oppressed Afro-American people and their white allies are sure signs that the power structure is on its way out. They are now in their last days and soon they won't be able to oppress anybody because they themselves will be before the People's courts to be punished for their crimes against humanity as were the German war criminals at Nuremberg." (Pl. Exh. 19; Def. Proposed Finding of Fact No. 28.)

It is undisputed that as a result of plaintiff's refusal to cease and desist from "practicing law" in the institution, and his refusal to answer questions about R.N.A., and because of the statement in plaintiff's letter to his sister that "he would be leaving the institution soon," defendant Follette decided to place plaintiff in the punitive segregation unit (Def. Proposed Finding of Fact No. 31; T. 1248-1249).

The proof also established: 1) plaintiff received no prior written noice of the above charges which resulted in his segregation; 2) there was no record made of the discussion with the Warden; 3) defendant McGinnis, the Commissioner of Corrections, was notified of plaintiff's confinement and the reasons therefor but took no action (T. 692-700; Pl. Exh. 29, 29A-F); 4) plaintiff was not charged with violence, attempting to escape, incitement to riot or any similar charge; and 5) plaintiff remained in

segregation from June 25, 1968 until released by order of this court, more than a year later, on July 2, 1969.

The parties have stipulated that as a result of solitary confinement for more than a year, Sostre has lost 124 1/3 days of "good time" credit, since under the rules a prisoner in solitary cannot earn good time [N. Y. Correction Law §§ 230, 234 (McKinney 1968); Pl. Exh. 1 at 5, Pl. Exh. 31; Reply Brief of Def. at 20].

There is also no real dispute as to the conditions which obtained in punitive segregation during plaintiff's year-long stay. There was only one other person incarcerated in the same group of cells as plaintiff (about four out of thirteen months) from August 14, 1968 to December 20, 1968 (Def. Proposed Finding of Fact No. 55; T. 97-98). One prisoner brought to solitary and placed in another group of cells committed suicide the next day (T. 127-131, 400-406, 793, 839, 895-896, 905-906). Plaintiff was deprived of second portions of food (T. 887-888) and all desserts as a punishment for the entire time (Def. Proposed Finding of Fact No. 41). He remained in his cell for 24 hours per day. He was allowed one hour per day of recreation in a small, completely enclosed yard. Sostre refused this privilege because it was conditioned upon submission, each day, to a mandatory "strip frisk" (completely naked) which included a rectal examination (Def. Proposed Finding of Facts Nos. 37-38; T. 88-90). He was permitted to shower and shave with *hot* water only once a week (Def. Proposed Finding of Fact No. 34). He was not permitted to use the prison library, read newspapers, see movies, or attend school or training programs (T. 91-93, 96-97). He was not allowed to work (T. 91). Prisoners in the general population who work are able to earn money with which they may purchase items from the

prison commissary, or purchase books, or subscribe to newspapers (T. 93). Prisoners in punitive segregation have access to only a few novels and "shoot-'em ups" selected for them (T. 92-93). But, as plaintiff and defendants' counsel put it, the crux of the matter is human isolation—the loss of "group privileges" (T. 87-88, 165-166). Release from segregation is wholly within the discretion of the Warden. However, a recommendation from a non-professional, so-called, group therapy counsellor might help (T. 134-136, 388, 773-774, 917, 921).

This court finds that punitive segregation under the conditions to which plaintiff was subjected at Green Haven is physically harsh, destructive of morale, dehumanizing in the sense that it is needlessly degrading, and dangerous to the maintenance of sanity when continued for more than a short period of time which should certainly not exceed 15 days (T. 300, 317-320).

After plaintiff was sent to solitary confinement on June 25, 1968, his cell was searched. The Warden alleged in an affidavit filed on July 3, 1969 that the search revealed contraband. This consisted of: 1) a letter from a court belonging to another inmate (which plaintiff was translating into Spanish for that other inmate) (T. 66-67; Pl. Exh. 21); and 2) two small pieces of emery paper (Pl. Exh. 37, at 2; T. 683-684). A Disciplinary Report dated June 25, 1968 (Pl. Exh. 22-C) records that plaintiff was reprimanded for possessing the letter. There is no similar report regarding the emery paper, although the Warden alleged both items were found at the same time (Pl. Exh. 37, at 2). The Warden claims that the emery paper was "adaptable for the fashioning of a key or lock picking tool" (Pl. Exh. 37 at 2). Plaintiff denied ever having seen the emery paper before trial (T. 65-67). The court believes plaintiff's testimony for the following reasons: 1) plaintiff was already in punitive segregation when the emery paper was allegedly found in his cell; 2) the Disci-

plinary Report of June 25, 1968 does not contain this charge (Pl. Exh. 22-C); 3) the first written recordation of any such charge against Sostre does not appear until October 29, 1968, shortly after Sostre filed his *pro se* complaint in this action on October 15, 1968 (Pl. Exh. 29-F); 4) defendants have not requested this court to make any finding with respect to the emery paper in their proposed findings of fact. On June 25, 1968, search of Sostre's cell also revealed that he was lending his law books to other inmates, after removing therefrom a stamp identifying these books (which turned out to be copies of the *Harvard Law Review*) as belonging to Sostre (Follette Dep. 62-64, 117). This along with the two preceding charges was one of the charges originally put forth by defendants as a reason for Sostre's confinement but dropped upon the trial (T. 1248-1249, 683-684).

The day after plaintiff's court-ordered release from segregation, July 3, 1969, he was again disciplined. This time he was charged with having dust on his cell bars. The punishment was to confine him to his cell for several days. Again, plaintiff denied this charge, claiming he was so charged and punished in order that he would miss the regular July 4th celebration. This celebration would have brought Sostre in contact with prisoners from another part of the prison. Such contact is permitted only once a year on July 4 (T. 78-79). This court finds that this charge and punishment were imposed upon Sostre in retaliation for his legal success.

On or about August 3, 1969, plaintiff was again disciplined for having "inflammatory racist literature" in his cell. The punishment was deprivation of yard and movie privileges for 60 days (T. 74-77, 1071-1073). The so-called "inflammatory racist literature" consisted of handwritten political articles by Sostre, some of which contained excerpts from articles printed in newspapers and magazines in general circulation in the prison (T. 72-77; Pl. Exh.

23) and lists of officers of the Black Panther Party and the Republic of New Africa, copied from similar articles in *Esquire* and other magazines (T. 72).

All of plaintiff's letters to and from his attorney, Joan Franklin, were censored by the Warden. He excised therefrom everything which he believed was not directly related to Sostre's immediate case (Pl. Exh. 3, 4, 7, 8, 10, 12, 13, 14, 19-23, 29-30, 33-38; Follette Dep. at 69, 70, 136, 139). And a letter to the Postal Inspector of the United States Post Office complaining about plaintiff's failure to receive receipts for certified mail was also not mailed by the Warden (Pl. Exh. 11; T. 35).

This court finds from all of the facts and circumstances of this case, as set forth above, that Sostre was sent to punitive segregation and kept there until released by court order not because of any serious infraction of the rules of prison discipline, or even for any minor infraction, but because Sostre was being punished specially by the Warden because of his legal and Black Muslim activities during his 1952-1964 incarceration, because of his threat to file a law suit against the Warden to secure his right to unrestricted correspondence with his attorney and to aid his codefendant (T. 52; Def. Post Trial Brief at 20, 32) and because he is, unquestionably, a black militant who persists in writing and expressing his militant and radical ideas in prison (T. 71-77, 1316-1319; Pl. Exh. 23).

I. Cruel and Unusual Punishment

Plaintiff claims that his confinement to punitive segregation for an indefinite period of time amounted to cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments to the Constitution, arising not only from the reasons for his confinement and the length of his confinement, but also from the conditions of his confinement.[5] This court agrees and so holds. *See Wright* v. *McMann*, 387 F. 2d 519 (2d Cir. 1967).

Appendix B.

Prisoners at Green Haven may prepare legal papers for themselves. There is no rule of the prison which prohibits inmates from preparing legal papers for their non-inmate codefendants. However, the rules do bar inmates except upon approval of the warden, from assisting "other inmates in the preparation of legal papers." (Pl. Exh. 1, Rule 21, Inmates' Rule Book.) The Warden claims he relied upon the decision of the New York Court of Appeals in *Brabson* v. *Wilkins*, 19 N. Y. 2d 433 (1967), in denying plaintiff the right to prepare and mail out a motion for his codefendant and in punishing him for this act. In *Brabson*, the majority expressly refused to follow the decision of the District Court in *Johnson* v. *Avery*, 252 F. Supp. 783 (M. D. Tenn. 1966), upholding the right of a state prisoner to prepare a federal writ of habeas corpus for another state prisoner. In *Johnson*, the prisoner-plaintiff who had prepared the writ had been sent to solitary confinement. He was ordered released by the District Court. Subsequent to the filing of this law suit (October 15, 1968) the United States Supreme Court, on February 24, 1969, affirmed the District Court's decision in *Johnson* v. *Avery*, *supra*, *aff'd* 393 U. S. 483 (1969), *rev'ng* 382 F. 2d 353 (6th Cir. 1967).

The fact that the Warden continued to confine Sostre to punitive segregation after the Supreme Court's decision in *Johnson* v. *Avery*, *supra*, on February 24, 1969, makes it clear that although the Warden assigned as a reason for such confinement the fact that Sostre prepared a motion for a codefendant, this was not a bona fide reason for such confinement. But even if Follette did in fact, discipline plaintiff in 1968 for preparing a motion for his codefendant in violation of the dictates of *Brabson*, this court holds that the punishment imposed upon Sostre for this offense, which was indefinite confinement to punitive segregation, was so disproportionate to the offense

committed as to amount to cruel and unusual punishment. *Weems* v. *United States*, 217 U. S. 349 (1910); *Fulwood* v. *Clemmer*, 206 F. Supp. 370 (D. C. D. C. 1962). It is clear from all of the facts in this case that but for the intervention of this court (which released Sostre from confinement after more than a year) Sostre would, in all likelihood, still be in punitive segregation for this alleged offense.

The Warden claimed that he assigned Sostre to punitive segregation because Sostre refused to answer "fully and truthfully" questions put to him by the Warden about the meaning of the letters R.N.A. (Pl. Exh. 1, Rule 12, Inmates' Rule Book). The court disbelieves that ambiguous claim. But even if this were true, assignment to punitive segregation for an indefinite period of time for this infraction of the rules is likewise so disproportionate to the charge, as to be clearly barred by the Eighth Amendment prohibition against disproportionate punishment.

The court also holds that the totality of the circumstances to which Sostre was subjected for more than a year was cruel and unusual punishment when tested against "the evolving standards of decency that mark the progress of a maturing society." *Trop* v. *Dulles*, 356 U. S. 86, 101 (1958) (Opinion of Warren, C. J.). *Accord*, *Jackson* v. *Bishop*, 404 F. 2d 571, 579 (8th Cir. 1968); *Jordan* v. *Fitzharris*, 257 F. Supp. 674, 679 (N. D. Cal. 1966). *See Wright* v. *McMann*, *supra*; The American Correctional Association, *Manual of Correctional Standards*, 414-415 (3rd ed. 1966); The American Law Institute, *Model Penal Code* § 304.7(3) (Proposed Official Draft 1962); Note, *The Problems of Modern Penology: Prison Life and Prisoners' Rights*, 53 Iowa L. Rev. 671, 672 (1967); T. 511).

"[T]his condemnation of segregation is the experience years ago of people going stir crazy, especially in segregation" (T. 320). The conditions which undeniably existed in punitive segregation at Green Haven, this court finds, "could only serve to destroy completely the spirit and

undermine the sanity of the prisoner," *Wright* v. *McMann*, *supra*, at 526, when imposed for more than fifteen days. Subjecting a prisoner to the demonstrated risk of the loss of his sanity as punishment for any offense in prison is plainly cruel and unusual punishment as judged by present standards of decency. *Cf. Ex parte Medley*, 134 U. S. 160, 167-170 (1890). In order to be constitutional, punitive segregation as practiced in Green Haven must be limited to no more than fifteen days and may be imposed only for serious infractions of the rules.

II. Procedural Due Process

Plaintiff claims that his confinement to segregation for more than a year was effected in violation of his right not to be deprived of his liberty without due process of law as guaranteed by the Fifth and Fourteenth Amendments to the Federal Constitution, in that: 1) he was sentenced to such confinement for offenses which under the rules of the prison did not constitute offenses; 2) with respect to the charge involving the emery paper there was no proof that he had such paper in his possession; 3) he did not receive advance written notice of the charges; 4) he was denied the right to assistance of counsel or a counsel substitute; 5) he was denied the right to call witnesses in rebuttal of the charges; 6) he was denied the right to confront or cross-examine witnesses; 7) there were no written records of the disciplinary proceedings against him other than a notation of the charges, plaintiff's plea, and defendants' summary determination of guilt; 8) the right to appeal and the ability to make a meaningful appeal were denied as a result of the omission of his right to counsel, to call and cross-examine witnesses, and to have a written record.

As a result of his confinement, plaintiff lost 124⅓ days of good time which might otherwise have been applied

both to hasten consideration of his eligibility for parole and in mandating his release on parole. N. Y. Correction Law §§ 230, 803 (McKinney 1968).

Very recently, the Supreme Court reiterated the firmly-established due process principle that where governmental action may seriously injure an individual, and the reasonableness of that action depends on fact findings, the evidence used to prove the government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. The individual must also have the right to retain counsel. The decision-maker's conclusion must rest solely on the legal rules and evidence adduced at the hearing. In this connection, the decision-maker should state the reasons for his determination and indicate the evidence upon which he relied. Finally, in such cases, the high Court ruled, an impartial decision-maker is essential. *Goldberg* v. *Kelly*, —— U. S. —— (1970); *accord*, *Escalera* v. *New York City Housing Authority* (Nos. 33226-33229) (2d Cir. April 29, 1970).

This court holds that plaintiff was, in effect, "sentenced" to more than a year in punitive segregation without the minimal procedural safeguards required for the imposition of such drastic punishment upon a prisoner. This punishment not only caused plaintiff physical deprivation, needless degradation, loss of work, training and self improvement opportunities, and mental suffering, but materially affected the length of time he must serve under his court-imposed sentence.

Before plaintiff could have been constitutionally "sentenced" to punitive segregation, he was entitled to: 1) written notice of the charges against him (in advance of a hearing) which designated the prison rule violated; 2) a hearing before an impartial official at which he had the right to cross-examine his accusers and call witnesses in rebuttal; 3) a written record of the hearing, decision, rea-

sons therefor and evidence relied upon; and 4) retain counsel or a counsel substitute.

A prisoner carries with him to prison his right to procedural due process which applies to charges for which he may receive punitive segregation or any other punishment for which earned good time credit may be revoked or the opportunity to earn good time credit is denied. There is no place in our system of law for reaching the result which occurred here without the safeguards listed above. *Mempa* v. *Rhay*, 389 U. S. 128 (1967); *In re Gault*, 387 U. S. 1 (1967); *Kent* v. *United States*, 383 U. S. 541, 554 (1966); *Hewett* v. *State of North Carolina*, 415 F. 2d 1316 (4th Cir. 1969); *Shone* v. *State of Maine*, 406 F. 2d 844 (1st Cir.), *vacated as moot*, 396 U. S. 6 (1969); *cf. Talley* v. *Stephens*, 247 F. Supp. 683, 689 (E. D. Ark. 1965).* Prisoners do not lose all of their rights under the Constitution when sentenced to prison. *Washington* v. *Lee*, 263 F. Supp. 327 (M. D. Ala. 1966), *aff'd per curiam*, 390 U. S. 333 (1968); *Sostre* v. *McGinnis*, 334 F. 2d 334 F. 2d 906 (2d Cir.), *cert. den.*, 379 U. S. 892 (1964); *Pierce, Sostre, SaMarion* v. *La Vallee*, 293 F. 2d 233 (2d Cir. 1961). And basic constitutional rights cannot be sacrificed, even in the case of prisoners, "in the interest of administrative efficiency." *United States ex rel. Marcial* v. *Fay*, 247 F. 2d 662, 669 (2d Cir. 1957), *cert denied*, 355 U. S. 915 (1958); *Burns* v. *Swenson*, 288 F. Supp. 4 (W. D. Mo. 1968), *modified*, 300 F. Supp. 759 (W. D. Mo. 1969). *See* President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Corrections*, 82-83 (1967); President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society*, 181 (1967). *See also* Barkin, *The Emer-*

* In the related case of *Jackson* v. *Bishop*, 404 F. 2d 571 (8th Cir. 1968), the Eighth Circuit instructed the district court to enjoin *any* use of the strap.

gence of Correctional Law and the Awareness of the Rights of the Convicted, 45 Neb. L. Rev. 669 (1966); The American Law Institute, *Model Penal Code*, § 304.7(2) (Proposed Official Draft 1962).

III. Access to Courts and Public Officials

The refusal to mail the certificate of reasonable doubt immediately after plaintiff arrived at Attica and immediately after his arrival at Green Haven was not such an unreasonable restriction of plaintiff's rights as to require a finding of unconstitutional action by defendants in this respect. The certificate of reasonable doubt was mailed shortly after plaintiff's arrival at Green Haven. Apparently, the few days involved did not defeat plaintiff's right to file such a certificate, since no claim is made that the delay interfered with the timeliness of its filing.

There is no question that defendants cannot unreasonably restrict the right of plaintiff to apply to the state court for relief. *Cf. Johnson* v. *Avery*, *supra*; *Ex parte Hull*, 312 U. S. 546 (1941). "[A] right of access to the courts is one of the rights a prisoner clearly retains. It is a precious right, and its administratively unfettered exercise may be of incalculable importance in the protection of rights even more precious." *Coleman* v. *Peyton*, 362 F. 2d 905, 907 (4th Cir.), *cert. den.*, 385 U. S. 905 (1966). *See*, *Stiltner* v. *Rhay*, 322 F. 2d 314, 316 (9th Cir. 1963), *cert. den. sub nom.*, *Stiltner* v. *Washington*, 376 U. S. 920 (1964).

Warden Follette censored mail to and from plaintiff's counsel by excising therefrom whatever, in his judgment, was not relevant to plaintiff's case. In support of his position, the Warden relies upon *Brabson* v. *Wilkins*, 19 N. Y. 2d 433 (1967), which upheld the right of the prior Warden at Attica Prison to intercept and withhold from

a prisoner communications to and from an attorney dealing with matters other than "legality of detention and treatment received." In short, the prisoner could write to his attorney about legal matters and treatment only. *Brabson, supra*, at 437. The court in *Brabson* had also limited the prisoner's right to write to executive officials to "complaints of unlawful treatment", but it placed no limitation on anything written to a court by a prisoner. *Id.*

Plaintiff contends that defendants' arbitrary and capricious action with respect to his correspondence with his attorney violated not only his Fourteenth Amendment right as recognized by the case law but also his Sixth Amendment right to the effective assistance of counsel.

This court agrees with, and adopts, the holding and rationale of the three dissenting judges (Keating, Fuld, Van Voorhis) in *Brabson, supra*. Judge Keating, who wrote the dissenting opinion, said:

> I believe that these limitations as well as the authority given the Warden unnecessarily interfere with and endanger this prisoner's right to communicate with his attorney and governmental officials having either jurisdiction over the penal system or the power and authority to correct conditions existing therein . . .
>
> * * *
>
> . . . Judges and courts are not the only persons or agencies capable of granting relief to prisoners complaining about the illegality of their treatment or detention. For this reason, I see no basis for distinguishing between letters to courts, to the prisoner's attorney or to government officials. In all of these cases only the recipients of the letters should be permitted to determine whether the contents warrant their

intervention and not the very person whose jurisdiction and conduct are being questioned.

* * *

Exactly how the exercise of this right will undermine prison discipline and authority is not made clear. The Attorney General alleges that "prisoners would be able to carry on unauthorized activities through communications from prisoners to their attorneys and thence to third parties." Uncensored communications, however, presently occur on personal visits to the prison by the prisoner's attorney and members of his family, without any apparent undermining of prison discipline. In any event, the right of a prisoner to unexpurgated communications with his attorney is so significant that it outweighs the danger of frustration of prison rules regarding outside activities in the rare case where an attorney—an officer of the court—would assist a prisoner in avoiding legitimate prison regulations.

Judge Keating then went on to reiterate, as other courts had, that prisoners do retain certain constitutional rights in prison:

The right of an individual to seek relief from illegal treatment or to complain about unlawful conduct does not end when the doors of a prison close behind him. True it is that a person sentenced to a period of confinement in a penal institution is necessarily deprived of many personal liberties. Yet there are certain rights so necessary and essential to prevent the abuse of power and illegal conduct that not even a prison sentence can annul them. As this court once observed, "An individual, once validly convicted and placed under the jurisdiction of the Department of Cor-

rection * * *, is not to be divested of all the rights and unalterably abandoned and forgotten by the remainder of society." (*People ex rel. Brown* v. *Johnston*, 9 N. Y. 2d 482, 485, 215 N.Y.S. 2d 44, 46, 174 N. E. 2d 725, 726).

Among the rights of which he may not be deprived is the right to communicate, without interference, with officers of the court and governmental officials; with those persons capable of responding to calls for assistance. No valid reason, other than the shibboleth of prison discipline, has been advanced for the denial of this right in the case before us. I believe that courts should look behind inappropriate slogans so often offered up as excuses for ignoring or abridging the constitutional rights of our citizens.

19 N. Y. 2d at 438, 440. *See also, Fulwood* v. *Clemmer*, 206 F. Supp. 370, 376 (D.C.D.C. 1962); *Burns* v. *Swenson*, 300 F. Supp. 759, 762 (W. D. Mo. 1969).

For the foregoing reasons, Warden Follette's refusal to mail plaintiff's letter to the United States Postal Inspector was also improper

IV. Freedom of Political Expression

About a month after this court ordered plaintiff's release from solitary confinement on July 2, 1969, plaintiff was charged with the possession of contraband found in his cell. This consisted of political literature, such as a list of officers of the Black Panther Party and Republic of New Africa, and "Revolutionary Thoughts" put on paper by plaintiff. Some of this matter was copied from newspapers and magazines which had been legally and regularly circulated in the prison (T. 71-77; Pl. Exh. 23). This information was characterized by the Deputy Warden as racist and, consequently, contraband (T. 1071-1073).

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The Deputy Warden found plaintiff guilty of possession of such contraband and punished him by the denial of 60 days of yard time and movies (T. 1071-1072; Pl. Exh. 29E). This action on the part of defendants must be considered in conjunction with the Warden's sending Sostre to solitary confinement initially because of the statement made in the letter to his sister and because of Sostre's refusal to answer questions about R.N.A. Thus considered, there is no room for doubt that Sostre's troubles with defendants stem not from his acts or threats to prison security, but from his political thoughts and beliefs, as expressed in the literature he reads and the letters he writes (Pl. Exh. 29, 29A-29E). Sostre was not charged with organizing a chapter of R.N.A. in prison, making inflammatory racist speeches to other prisoners, or urging revolt by inmates against prison officials prior or subsequent to being sent to punitive segregation. Sostre had been previously sent to segregation because of something he had *written* to his sister and because of his refusal to answer questions about a political organization. And even the August 3, 1969 charge was that of mere possession of "racist" literature.

The First Amendment to the Constitution is a guarantee that freedom of the mind shall have the same protection as freedom of religion and that [g]reat secular causes, with small ones, are guarded" against unreasonable governmental infringement. *Thomas* v. *Collins*, 323 U. S. 516, 531 (1945). The question, therefore, is whether a prisoner sentenced to a state prison carries with him his First Amendment rights to freedom of speech, i.e., freedom of political thought and writing guaranteed against state infringement by the Fourteenth Amendment to the Federal Constitution. The Sixth Circuit has written: "A prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by

law." *Coffin* v. *Reichard*, 143 F. 2d 443, 445 (6th Cir. 1944). There the court held that a prisoner retains his right to personal security against unlawful invasion. And the Court of Appeals of this Circuit as well as other Circuit Courts have recognized the right of prisoners to religious liberty guaranteed by the First and Fourteenth Amendments against unreasonable restrictions of prison officials. *See e.g., Sostre* v. *McGinnis*, 334 F. 2d 906 (2d Cir.), *cert. den.*, 379 U. S. 892 (1964); *Pierce, Sostre, SaMarion* v. *La Vallee*, 293 F. 2d 233 (2d Cir. 1961); *Long* v. *Parker*, 390 F. 2d 816 (3rd Cir. 1968); *Cooper* v. *Pate*, 382 F. 2d 518 (7th Cir. 1967); *Barnett* v. *Rodgers*, 410 F. 2d 995 (D. C. Cir. 1969). Other cases, cited and discussed above, make clear that a prisoner retains his right to access to the courts, freedom from cruel and unusual punishment, and certain procedural due process rights. The right to freedom of political thought and expression is also among those rights which a prisoner takes with him to prison (subject to reasonable rules and regulations necessary to maintain prison discipline) since, as the court reminded us in *La Vallee, supra*, at 235, when we talk about First Amendment rights we are talking about "preferred" constitutional rights.

Follette claims that he put Sostre in punitive segregation because he feared that Sostre would break out of prison (T. 1241-1242). The Warden's evidence for such a significant conclusion was Sostre's letter to his sister. This court finds that the statements in Sostre's letter to his sister, *supra*, cannot properly be construed as a threat to escape from prison. The letter affirmed Sostre's belief that he would be released through legal process; the remainder was sheer political hyperbole. The undisputed evidence established that shortly before trial defendants voluntarily transferred plaintiff to another state prison, Wallkill, where he would be nearer his attorney for purposes of preparing for trial. At Wallkill Sostre has been

permitted to help organize a Black Studies program, an Afro-American Cultural Society and an Afro-Asian Book Shop. He is able to read, share his books, obtain books and possess political literature of the very kind for which he was punished at Green Haven (T. 140-143, 276, 1307-1310). As a matter of fact, the undisputed testimony was that the Warden at Wallkill had approved Sostre's Afro-American Society program and was seeking professional help for Sostre in setting up the program as a model for other prisons (T. 143).

The Court, therefore, finds that Sostre's writings, refusal to answer questions about a political organization, and possession of political literature in the prison before and since his commitment to punitive segregation, whether considered singly or together, neither caused any disturbance or security risk nor provided the basis for any reasonable apprehension of such disturbance or security risk in the minds of the prison officials (Pl. Exh. 29, 29A-29E).

The Second Circuit said in *Pierce, Sostre, SaMarion* v. *La Vallee, supra,* at 235, that a prisoner may not be punished solely because of his religious beliefs. Under the rationale of *Johnson* v. *Avery, supra,* a man may not be punished for reasonably exercising his First Amendment rights, as here, or any other federally protected right. It is not a function of our prison system to make prisoners conform in their political thought and belief to ideas acceptable to their jailers. On the other hand, one function is to try to rehabilitate the lawbreaker by convincing him of the validity of our legal system. There is little chance that such an objective will be achieved if prisoners are entrusted to those who likewise break the law by denying prisoners their basic constitutional rights. This court holds that Sostre's confinement to punitive segregation for the letters he wrote and for refusal to answer ques-

tions about a political organization, and his subsequent punishment for mere possession of political literature, were unreasonable punishments and violated his First Amendment right to freedom of political expression.

V. Racial Discrimination in the Operation of State Prisons

Plaintiff alleged in his complaint that the defendant Governor of New York, the defendant Commissioner of Corrections, and the two defendant Wardens "together with unknown others, did, at a time prior to the filing of the original complaint in this action, join and engage in an unlawful conspiracy to deprive plaintiff and other prisoners of black and other non-Caucasion races of their rights under the Thirteenth and Fourteenth Amendments to the Constitution" (Amended Complaint, para. 18). In support of the conspiracy allegation, the complaint alleges that defendants are administering the prisons in the State of New York in a racially discriminatory fashion since, despite the fact that over 70% of the inmates in the state prison system are non-whites, only 2% of the entire guard force in the prison is composed of blacks or Puerto Ricans; and these few are assigned to inferior positions. There are not, nor have there ever been, according to the complaint, non-white wardens or deputy wardens or commissioners or deputy commissioners of corrections. At Attica Prison, under the direction and control of defendant Mancusi, it is alleged, there is a non-white population of 75% of all inmates but only one or two non-white guards. Plaintiff alleges that as a result of the foregoing facts, non-white prisoners, and especially Afro-American prisoners, are subject to discrimination, persecution, and denial of their basic human rights, and the badges and incidents of slavery in violation of the Thirteenth and Fourteenth Amendments (Amended Complaint, paras. 20, 21).

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Plaintiff, of course, has standing to challenge any racially discriminatory practices pursued by state officials in the state's prisons where he resides and is subject to reside. *Washington* v. *Lee*, 263 F. Supp. 327 (M. D. Ala. 1966), *aff'd per curiam*, 390 U. S. 333 (1968). However, plaintiff has failed to carry his burden of proving, by a fair preponderance of the evidence, that the paltry number of non-white guards and other personnel, acknowledged by defendants, resulted from racial discrimination against qualified applicants or a conspiracy to deny blacks and Puerto Ricans their rights.

Defendants claimed that wardens, guards and other prison personnel are appointed pursuant to the state's civil service system. Plaintiff offered no proof to rebut this assertion. Defendant also claimed that the low percentage of non-white personnel at certain prisons—including Green Haven and Attica—results from the fact that they are located in upstate rural areas where there are relatively few non-whites and Puerto Ricans. Non-whites and Puerto Ricans, therefore, have not applied for positions in those upstate prisons despite campaigns of recruitment, preferring assignment to Sing Sing Prison which is nearer to New York City. Plaintiff again offered no proof to rebut this assertion.

As to the situation at Green Haven, plaintiff, himself, testified that just after this suit was commenced, a few new non-whites were added to the guard staff (T. 1317-1318). From this evidence it may be inferred that plaintiff's claim is correct; but this evidence also tends to sustain defendants' claim that they have been trying to recruit more non-whites. In this connection, it should be noted that the prison doctor at Green Haven, who testified upon the trial, was a black man. This, again, tends to support defendants' claim of non-discrimination. In any event, in the absence of a fair preponderance of proof of

discrimination or proof of failure to specially recruit, no relief can be granted as to this claim. The court does not understand defendants to dispute their duty to remedy the distorted situation by programs of special recruitment. The third cause of action is, therefore, dismissed as to all parties. Since Governor Rockefeller was named only in this third cause of action, relating to this alleged conspiracy, and plaintiff's case completely fails as to him, this case as to him is dismissed.

VI. Jurisdiction

Despite the language of the Second Circuit in *Wright* v. *McMann*, 387 F. 2d 519 (1967), squarely upholding jurisdiction under 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3), in a suit for injunction and damages against Daniel McMann, as Warden of Clinton State Prison, defendants claim that this court is wholly without jurisdiction of the instant suit for the same relief because it is admittedly brought against defendants in their official capacities as opposed to their individual capacities. It is, therefore, defendants say, a suit against the state, long since barred by the Eleventh Amendment. In addition, defendants claim that the Civil Rights Acts did not repeal the Eleventh Amendment and, consequently, a state is not a person within the meaning of Section 1983. In this connection, defendants called to the court's attention a recent Second Circuit case, *Zuckerman* v. *Appellate Division*, 421 F. 2d 625 (1970), in which the court held that the Appellate Division, a New York State court, is not a "person" within the meaning of 42 U.S.C. § 1983. In so holding, the court relied upon *Monroe* v. *Pape*, 365 U. S. 167 (1961), which held that a municipality is not a "person" within Section 1983, and *Williford* v. *California*, 352 F. 2d 474 (9th Cir. 1965), holding that a state is not a "person" within the contemplation of Section 1983. Defendants, relying upon

Zuckerman, argue that since plaintiff admits that his suit against defendants in their official capacities is, in reality, a suit against the State, the court is likewise without jurisdiction under Section 1983. 28 U.S.C. § 1343(3).[10]

Plaintiff has not sued the State of New York as did the plaintiff in *Williford v. California*, *supra*, or any part of the judicial arm of the State as was the case in *Zuckerman*.[11] Plaintiff has sued individuals, only, as state officers. The question, therefore, is whether state officers, *qua* state officers, are amenable to suit for injunction and damages under Section 1983.

The Eleventh Amendment to the Federal Constitution has been construed as prohibiting a suit by a citizen of a state against the state of which he is a citizen without its consent. *Hans* v. *Louisiana*, 134 U. S. 1 (1890); *Parden* v. *Terminal R. of Alabama State Docks Dept.*, 377 U. S. 184 (1964) (dictum).

The Fourteenth Amendment, on the other hand, provides that, ". . . No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Section 1.

As a result, enforcement of the Fourteenth Amendment has involved the Supreme Court in historic attempts to reconcile its construction of the Eleventh Amendment with the unequivocal prohibitions of the Fourteenth Amendment.

A. The Eleventh Amendment

Ever since *Ex parte Young*, 209 U. S. 123 (1908) state attorneys general and other state officials have been regularly enjoined from enforcing state statutes which violate the Fourteenth Amendment, despite the Eleventh Amendment, as a result of a Court-made fiction. This fiction has lived on, despite the Court's own immutable view

that the Fourteenth Amendment is applicable only to state action and not private action. C. Wright, *Law of Federal Courts* § 48 (2d ed. 1970). K. Davis, 3 *Administrative Law Treatise* §§ 27.01, 27.10 (Supp. 1965). The Court in *Ex parte Young* rationalized that, when a state official seeks to enforce a state statute which violates a prohibition of the Fourteenth Amendment, he is in that case stripped of his official character, and is subject in his person to the consequences of his individual conduct, since a state cannot act unconstitutionally. In other words, as one writer has noted, the Court created the anomaly that enforcement of an unconstitutional state statute is state action for the purposes of the Fourteenth Amendment, but individual action for the purposes of the Eleventh Amendment. C. Wright, *supra*, at 159.

Five years after *Ex parte Young*, the Court in *Home Telephone & Telegraph Co.* v. *Los Angeles*, 227 U. S. 278 (1913), a suit for injunction against a city to enjoin enforcement of a municipal ordinance on Fourteenth Amendment grounds, the Court made clear that a state official or agency is subject to suit in his or its official capacity for purposes of the Fourteenth Amendment. It ruled: "... the provisions of the Amendment as conclusively fixed by previous decisions are generic in their terms; are addressed, of course, to the states, but also to every person, whether natural or juridicial, who is the repository of state power." *Id.* at 286. The Court then went on to say that the Amendment's applicability is not limited to those persons who are acting pursuant to state statute but extends as well to those who exceed their authority. *Id.* at 287. Again, the Court was making it absolutely clear that the amendment is concerned only with exertion of state power in every form and not with private action and, therefore, to be enforcible the Amendment must be made applicable to state officials acting in their

official capacities, whether the action taken by them is authorized or not.

In *Shelley* v. *Kraemer*, 334 U. S. 1 (1948), the Court, once again, reaffirmed that the Fourteenth Amendment reaches and controls state officials *in their official capacities*. In reiterating earlier Court holdings that the Amendment applies to the action of a state court the Court said: "A state acts by its legislative, its executive, or its judicial authorities. *It can act in no other way.*" (Emphasis added.) *Id.* at 14 [citing *Ex parte Virginia*, 100 U. S. 339, 347 (1880)].

If there is any doubt left as to whether violations of the Fourteenth Amendment by state officers or agencies, acting in their official capacities, may be enjoined by the federal courts, one need only turn to *Baker* v. *Carr*, 369 U. S. 186 (1962), and its progeny, *e.g.*, *Wells* v. *Rockefeller*, 273 F. Supp. 984 (S.D.N.Y.), *aff'd* 389 U. S. 421 (1967). In the *Wells* case, a suit for injunction to enjoin enforcement of New York's congressional redistricting statute, the Governor, the Attorney General, the Secretary of State, the Lieutenant Governor, and the Presiding Officers of both the Senate and the Assembly of the State of New York were all sued in their official capacities and ordered by the District Court to "enact into law a congressional districting plan, . . . which . . . shall be in conformity with the redistricting principles . . ." announced by the Court in *Baker* v. *Carr*, *supra*. *Wells* v. *Rockefeller*, 281 F. Supp. 821, 822 (1968).

Then if there is any doubt as to whether a federal court can award damages against state officials in their official capacities, despite the Eleventh Amendment, *see Thompson* v. *Shapiro*, 270 F. Supp. 331 (D. Conn. 1967), *aff'd* 394 U. S. 618 (1969), ordering payments unconstitutionally withheld from a welfare recipient to be paid by the State Welfare Commissioner. *But see Westberry* v. *Fisher*, 309 F. Supp. 12 (D. Me. 1970).

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In *Westberry*, the District Court held that the Eleventh Amendment prohibited welfare recipients from suing the State Welfare Commissioner in his official capacity for damages. The court conceded that the Fourteenth Amendment and Section 1983's enforcement of that Amendment supersedes the Eleventh Amendment in equitable actions, but ruled that such a doctrine should not be extended to damage actions because actions at law would affect state treasuries. This court does not agree with the District Court's analysis in *Westberry* because it does not take into account the effect which the vast equity powers of a federal court may have upon state treasuries in enforcing the Fourteenth Amendment, as demonstrated by *Griffin* v. *County School Board of Prince Edward County*, 377 U. S. 218 (1964). In *Griffin*, after rejecting the Eleventh Amendment argument, the Court held that it would be proper to force the reopening of public schools in Prince Edward County by "requir[ing] the Supervisors to exercise the power that is theirs to levy taxes to raise funds adequate to reopen, operate, and maintain . . . a public school system" of that county. *Id.* at 233.

An injunction that tells a state agency how it *must* collect and spend its money manifestly affects a state's treasury. Certainly, if the extraordinary remedy of an injunction can be used against a state to carry out the mandate of the Fourteenth Amendment, then the ordinary remedies at law can be used.

From a practical point of view, a state official or a state commission or a state agency, and not the political entity called a state or one of its political subdivisions, must be before the court since, as the Supreme Court has already noted, a state can act only through its agents, it can act in no other way. This concept of state action has manifest practical judicial considerations embodied in it. If an order is simply issued against a state, who is responsible?

Is it the governor, the legislature, the judiciary? How is an injunction against a state enforced? Who is brought in on contempt proceedings for failure to comply with a damage award? Clearly, unless some state official or agency is specifically enjoined it is difficult to see how such an injunction can be enforced. *See, e.g., United States* v. *Mississippi*, 380 U. S. 128, 141-142 (1965). The same is also true with respect to a judgment for damages. If the judgment runs against a state *qua* state, or a municipality, as opposed to one of its officials or agencies, how is that judgment enforced?

B. SECTION 1983 *Actions*

In *Monroe* v. *Pape*, 365 U. S. 167 (1961), the Court held: ". . . that Congress has the power to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it." *Id.* at 171-172. It then held that Congress, in enacting Section 1983, meant to give a remedy to parties deprived of constitutional rights "by an official's abuse of his position." *Id.* at 172.

42 U.S.C. § 1983 provides:

> *Civil Action for Deprivation of Rights*
>
> Every person, who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

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In *Monroe* v. *Pape*, *supra*, at 187, the Court adhered to the definition of the words "under color of" state law as formulated in *United States* v. *Classic*, 313 U. S. 299, 326 (1941) (in construing 18 U.S.C. § 242), and applied it to Section 1983:

> "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law."

365 U. S. at 184.

It expressly rejected, once again, the contention that the phrase "under color of" state law included only action taken by officials pursuant to state law. *Id.* at 184, 185. The phrase, therefore, includes action taken by state officials without state authorization. *Accord, Kerr* v. *City of Chicago*, —— F. 2d —— (No. 17345) (7th Cir. March 11, 1970).

The Court in *Monroe* also ruled that Section 1983: "... should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." *Id.* at 187.

Finally, with respect to whether a municipality is a "person" within the meaning of Section 1983, the Court held: "The response of the Congress to the proposal to make municipalities liable for certain actions being brought within federal purview by ... [1983], was so antagonistic that we cannot believe that the word 'person' was used in this particular Act to include them." *Id.* at 191.[12] The legislative history upon which this definition of "person" was based, revealed that "'the House had solemnly decided that in their judgment Congress had no constitutional power to impose any obligation upon county and town organizations, the mere instrumentality for the ad-

ministration of state law.'" *Id.* at 190 [quoting from Cong. Globe, 42nd Cong., 1st Sess. 804]. That statement can be read to mean that the House believed that although Congress could impose a liability on the states to respond in damages, as the principal, it could not impose any such liability upon "the mere instrumentality for the administration of state law." The Court expressly did not reach the policy considerations underlying the opposite result, such as the need for responsible defendants in suits against police officers. *Id.* at 191. And, most significantly for the instant case, it did *not* "reach the constitutional question whether Congress has the *power* to make municipalities liable for acts of its officers that violate the civil rights of individuals." *Id.* at 191 (Emphasis added).

In this case, however, we are not dealing with a municipality. We are dealing with state executive officials. It is clear that state officials, *qua* state officials, are "persons" within the contemplation of Section 1983 because, as the Court said in *Monroe*, the purpose of that Section is to provide a remedy against "state officials" who abuse their power. And the Second Circuit said in *Eisen* v. *Eastman*, 421 F.2d 560, 562-63 (2d Cir. 1969): "Actions against a governmental official acting 'under color of' statutes and ordinances are what 42 U.S.C. § 1983 is mainly about."

The instant suit is an action alleging deprivations of civil rights—it is one wherein the rights and immunities are those comprising personal liberty, not dependent for their existence upon the infringement of property rights. *Eisen* v. *Eastman*, *supra*, at 564. Therefore, this case falls squarely within the contemplation of Section 1983 and this court thus not only has jurisdiction, 28 U.S.C. § 1343(3), but the power, in a jurisdictional sense, to grant both equitable and legal relief.

The instant suit also predicates jurisdiction in this court on 28 U.S.C. § 1331, the general federal question jurisdic-

tion statute. In *Bell* v. *Hood*, 327 U. S. 678 (1946), the Court held: "And it is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution and to restrain individual state officers from doing what the 14th Amendment forbids the state to do. Moreover, where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Id.* at 684.

C. *Exhaustion of Administrative Remedies*

The State has not seen fit to provide a plain, speedy and adequate administrative remedy in a case of this kind. The only administrative remedy which Sostre had was to write a letter to the Commissioner.[13] However, this would have been futile since the evidence shows that soon after Sostre was placed in punitive segregation the Warden, himself, advised the Commissioner of his actions with respect to Sostre. This was in early July 1968 (T. 699). From March 1968 to October 1968, the Warden sent memoranda and letters to the Commissioner revealing his actions with respect to Sostre (Pl. Exh. 29, 29A-29F). There had been an inspector from the Commissioner's office at the prison in September 1968 who made a special memorandum to the file on conditions in punitive segregation at Green Haven (Def. Exh. BB; T. 1163-1164). There was also a general report in September 1968 regarding conditions at Green Haven to the Commissioner (Def. Exh. AA) which also reported on conditions in segregation. The Commissioner took no action with regard to Sostre or the conditions in punitive segregation until after Sostre filed his pro se complaint on October 15, 1968. The Commissioner then sent to the Warden a letter which had been

written to him by a private citizen on behalf of Sostre in which he requested the Warden to "give [him] complete information so that [he] may be in a position to more adequately answer [the] inquiry" (Pl. Exh. 30). There is no dispute that the Commissioner was fully advised of the treatment afforded Sostre and of Sostre's condition in segregation but never took any action (T. 700).

The Second Circuit said in *Eisen* v. *Eastman, supra,* at 569, that exhaustion of state administrative remedies is not required in actions under Section 1983 where the administrative remedy is inadequate or where it is certainly or probably futile, citing *Houghton* v. *Shafer,* 392 U. S. 639 (1968). In this case, as in *Houghton,* the defendants, including the Commissioner, take the position that the rules were validly and correctly applied to petitioner. The only recourse available to plaintiff was to write a letter to the Commissioner, the very person to whom the Warden had already reported and who takes this position. In a case such as this, where the person with the power to act has already been informed of the facts, it would be "to demand a futile act" to require an aggrieved person to first appeal to such person before resorting to a federal court for relief.[14] *Houghton* at 640.

VII. Injunctive Relief

The cases in which injunctions have been issued against state officials for violating Fourteenth Amendment rights in the last two decades are legion. Such injunctions issue, as a matter of right, where a violation of constitutional rights has been proved. This court has no discretion to deny injunctive relief to a person who clearly establishes, after a trial on the merits, that he is being denied his constitutional rights. *Cf. Henry* v. *Greenville Airport Commission, et al.,* 284 F. 2d 631 (4th Cir. 1960). In addition, the court's decree, where warranted, may provide for

the retention of jurisdiction to insure that the injunctive order is carried out in an orderly fashion, *Brown* v. *Board of Education of Topeka*, 349 U. S. 294 (1955); *Clemons* v. *Board of Education of Hillsboro*, 228 F. 2d 853, 859-860 (6th Cir.), *cert. den.*, 350 U. S. 1006 (1956), or to allow for the amendment of state rules to conform with the decree, *Sostre* v. *McGinnis*, *supra*, at 912-913. However, the injunction must issue.

Defendants Follette, McGinnis, and Mancusi will be enjoined from returning plaintiff to punitive segregation for charges previously preferred against him. They will be further enjoined from placing plaintiff in punitive segregation or subjecting him to any other punishment as a result of which he loses accrued good time credit or is unable to earn good time credit, without:

1) Giving him, in advance of a hearing, a written copy of any charges made against him, citing the written rule or regulation which it is charged he has violated;

2) Granting him a recorded hearing before a disinterested official where he will be entitled to cross-examine his accusers and to call witnesses on his own behalf;

3) Granting him the right to retain counsel or to appoint a counsel substitute;

4) Giving him, in writing, the decision of the hearing officer in which is briefly set forth the evidence upon which it is based, the reasons for the decision, and the legal basis for the punishment imposed.

Defendants will be required to credit plaintiff with the 124⅓ days of good time credit which he was unable to earn while wrongfully incarcerated in punitive segregation from June 25, 1968 to July 2, 1969.

Defendants will be required to submit proposed rules and regulations governing future disciplinary charges and

hearings where the possible punishments include punitive segregation or other loss of, or inability to earn, good time credit. *See Sostre* v. *McGinnis, supra,* at 912; *cf. In re Gault, supra.*

Defendants Follette, McGinnis, and Mancusi will also be permanently enjoined from censoring, refusing to mail, or refusing to give to Sostre: 1) Any communication between Sostre and the following—(a) any court; (b) any public official or agency; (c) any lawyer; (d) his codefendant in the criminal matter pending against him; and, 2) Any letter relating to any legal matter to or from any other inmate of Green Haven who requests the assistance of Sostre in translating that letter into English.

Defendants will also be permanently enjoined from punishing Sostre for sharing with other inmates his law books, law reviews, and other legal materials, and from refusing to permit Sostre to assist any other inmate in any legal matter as long as defendants have not provided any alternative means of legal assistance for such inmates. [Sostre, of course, may not receive compensation in any form for furnishing such assistance or for lending law books or other property. There was no claim here that Sostre received any such compensation.]

The complaint alleged that plaintiff had been subjected to punitive segregation "because of his participation in the black liberation movement and because of his statements concerning the racist and oppressive nature of the prison system, as directed and operated by the defendants and others" (Amended Complaint, para. 19). This court has found that plaintiff was punished because of his political views, which the prison authorities find offensive, under the pretext that Sostre had violated prison rules and regulations. Consequently, defendants Follette, McGinnis, and Mancusi will be enjoined from punishing Sostre for having in his possession political literature and for setting forth his political views orally or in writing, except for viola-

tion of reasonable rules approved by the court regulating freedom of speech. Defendants will be required to submit proposed rules and regulations governing the receipt, distribution, discussion and writing of political literature for court approval.

VIII. Damages

The final issue in this case is plaintiff's prayer for $1,200,000 damages.[15] As discussed above, plaintiff's right to recover damages against state officials in their official capacities, who violate rights secured to him by the Fourteenth Amendment, is provided for by 42 U.S.C. § 1983.

The evidence shows that plaintiff was subjected to punitive segregation without due process of law for more than one year under conditions which violate present standards of decency. The court finds that such cruel and unusual punishment over the long period of time involved here resulted in injury to plaintiff as follows: 1) severe physical deprivations, i.e., loss of energy-giving food and loss of exercise, 2) needless degradation, 3) loss of work opportunities of a rehabilitative nature, 4) loss of money which might have been earned by working, 5) loss of schooling and training opportunities, 6) loss of self-improvement through reading books of one's own choice, and 7) great mental anguish.

Therefore, the court awards plaintiff $25.00 per day for every day spent in punitive segregation (372 days), or a total of $9,300 compensatory damages against defendants Follette and McGinnis. "Compensatory damages for deprivation of a federal right are governed by federal standards, as provided by Congress in 42 U.S.C. § 1988. . . ." *Sullivan* v. *Little Hunting Park, Inc.*, 396 U. S. 229, 239 (1969); *Basista* v. *Weir*, 340 F. 2d 74, 87 (3rd Cir. 1965).

The bad faith and malice toward Sostre (based in large part upon political disagreement with him) that motivated

Follette to put plaintiff in punitive segregation and, in effect, to "throw the key away," and McGinnis' failure to act after being notified of Sostre's confinement as early as July 1968, are quite reprehensible; an award of exemplary damages is in order. *Basista* v. *Weir, supra,* at 87-88; *accord, Hague* v. *Committee for Industrial Organization,* 101 F. 2d 774, 789 (3rd Cir. 1939), *modified on other grounds,* 307 U. S. 496 (1939); *Antelope* v. *George,* 211 F. Supp. 657 (D. Idaho 962); *See also* Comment, *Civil Actions for Damages Under the Federal Civil Rights Statutes,* 45 Texas L. Rev. 1015 (1967). Otherwise, these malicious acts and acts of studied omission might recur in the future.

The Court, therefore, awards the additional sum of $10.00 per day, or a total of $3,720 in punitive damages against defendants Follette and McGinnis.

Additional support for the proposition that damage actions against state officials in their official capacities are maintainable under Section 1983, and for the award made here, may be garnered from those cases in which damages have been actually recovered against state officials so named. *Rhoads* v. *Horvat,* 270 F. Supp. 307 (D. Colo. 1967) ($5000 compensatory and $2500 punitive damages for 30-45 minute false imprisonment by county sheriff and deputy); *Rolfe* v. *County Board of Education of Lincoln Co., Tenn.,* 391 F. 2d 77 (6th Cir. 1968) ($3,473.60 and $2,563.31 compensatory damages, respectively, and $250 counsel fees each, for two teachers dismissed by superintendent of schools and county board of education); *Rackley* v. *School District No. 5, Orangeburg Co., S. C.,* 258 F. Supp. 676 (D. So. Car. 1966) ($4,064.61 compensatory damages for dismissal of teacher).

Similar support may be predicated upon those cases naming officials as such, in which the right to damages under Section 1983 has been expressly recognized. *Wall* v. *Stanly County Board of Education,* 378 F. 2d 275 (4th Cir.

1967) (actual damages ordered awarded for dismissal of teacher); *Smith v. Board of Education*, 365 F. 2d 770 (8th Cir. 1966) (*Id.* teacher); *Chambers v. Hendersonville City Board of Education*, 364 F. 2d 189 (4th Cir. 1966) (*Id.* teacher); *Johnson v. Branch*, 364 F. 2d 177 (4th Cir. 1966), *cert. den.* 385 U. S. 1003 (1967) (*Id.* teacher whose contract was not renewed); *Williams v. Sumter School District*, 255 F. Supp. 397 (D. So. Car. 1966) (settle order, "agreeing on damages, monetary relief, et cetera"); *Washington v. Official Court Stenographer*, 251 F. Supp. 945 (E. D. Va. 1966) (action by prisoner to compel furnishing of transcript in compliance with previous court orders: "Even if no actual damages are sustained, nominal and punitive damages may be recovered." *Id.* at 947); *Marshall v. Sawyer*, 301 F. 2d 639 (9th Cir. 1962) (action by gambler, charging blacklisting, against governor, gaming board and commission and members thereof, and others; remanded for determination of damage claims; subsequent judgment on merits for defendants *aff'd*, 365 F. 2d 105 (1966)).

Then there are those cases in which the right to seek Section 1983 remedies has been upheld. *American Federation of State, Co., and Mun. Employees v. Woodward*, 406 F. 2d 137 (8th Cir. 1969) (action for damages and injunctive relief against City Commissioner who discharged employees for joining labor union); *Wright v. McMann*, *supra* (action for $10,000 damages and injunctive relief against Warden of Clinton Prison).

Moreover, there are the suits for damages for deprivation of constitutional rights brought against state officials under the federal question jurisdiction statute, which the Supreme Court held maintainable, and which support the award made here. *Nixon v. Herndon*, 273 U. S. 536 (1927) (suit for $5,000 damages for denial of right to vote in primary election; jurisdiction based on violation of Fourteenth Amendment); *Wiley v. Sinkler*, 179 U. S. 58 (1900) (suit for $2,500 damages for denial of right to vote for

members of Congress, based on federal constitutional provisions).

Finally, if it can be said that Congress has not provided a damage remedy against state officials in their official capacities under Section 1983; and further, that there is no other federal remedy because *Monroe* v. *Pape*, *supra*, left the question open, or because of the Eleventh Amendment, then this court looks to New York's remedy (New York Correction Law § 6-b and New York Court of Claims Act § 8),[18] as provided by 42 U.S.C. § 1988,[17] to fill this deficiency in federal law. *Sullivan* v. *Little Hunting Park, Inc.*, 396 U. S. 229 (1969); *Basista* v. *Weir*, *supra*; *Pritchard* v. *Smith*, 289 F. 2d 153 (8th Cir. 1961); *Brazier* v. *Cherry*, 293 F. 2d 401 (5th Cir. 1961), *cert. den.*, 368 U. S. 921 (1961).

When we look at New York's remedy we find that New York has waived its Eleventh Amendment immunity, if it ever had any, as to Fourteenth Amendment actions, and has specifically provided for suit by state prisoners against correction officials in their official capacities, but has also provided for certain defenses to such suits. The court would borrow here, if necessary, New York's waiver of immunity but not its defenses. As the Court said in *Brazier* v. *Cherry*, *supra*:

> Thus § 1988 declares a simple, direct, abbreviated test: what is needed in the particular case under scrutiny to make the civil rights statutes fully effective? The answer to that inquiry is then matched against (a) federal law and if it is found wanting the court must look to (b) state law currently in effect. To whatever extent (b) helps, it is automatically available, not because it is procedure rather than substance, but because Congress says so.

Id. at 409.

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The Supreme Court has read into Section 1983 actions certain common law immunities and defenses. In *Pierson v. Ray*, 386 U. S. 547 (1967), the Court held that the common law immunity of judges from suits for damages for acts performed in the course of their official duties, applies to Section 1983 actions. It also held that police officers, although not enjoying the same immunity, are entitled to the common law defense of probable cause and good faith when sued for damages under Section 1983.

The question whether all state officials have complete or partial immunity has been decided by this Circuit. In *Hobson v. Hogue*, 355 F. 2d 129 (2d Cir. 1966), the court held that state common law immunities afforded to judges could not, consistently with Section 1983, be extended to the director of a state mental institution or the other officials who actually were responsible for the injury complained of, or who had the power to change the conditions about which the plaintiff complained. The court also disapproved of immunity for subordinate state officials for all discretionary acts. *Id.* at 134, ftn. 11.

The court in *Whirl v. Kern*, 407 F. 2d 781 (5th Cir. 1968), *cert. den.*, 396 U. S. 901 (1969), held: "[T]he breadth of a peace officer's privilege in an arrest situation is not necessarily the test of the breadth of a jailer's privilege in the context of a false imprisonment. There is no privilege in a jailer to keep a prisoner in jail beyond the period of his lawful sentence . . . The fact that the jailer is without personal knowledge that the prisoner is held unlawfully does not constitute a defense to an action for false imprisonment." *Id.* at 791. In *Whirl* the Fifth Circuit reversed a jury verdict for the defendant jailer and held that the defense of "good faith" is not available to a prison administrator who detained the prisoner for almost nine months because the prison administrator failed to properly process his release papers.

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In *Joseph* v. *Rowlen*, 402 F. 2d 367 (7th Cir. 1968), the court refused to grant immunity to a peace officer who made an arrest without a warrant and without probable cause.

Even if the defense of "good faith" were available to defendants in this Section 1983 damage action, the court finds that they had none. Sostre was, in fact, subjected to cruel and unusual punishment because he insisted upon exercising his constitutional rights. The multiplicity of charges against him was a pretext for his long punishment. And as set forth above, even if some of the charges found to be false were true, the long punishment for such offenses and the failure to take into account the Supreme Court's decision in *Johnson* v. *Avery*, *supra*, demolish any claim of good faith.

Although Follette claims that Sostre was not in solitary confinement but in punitive segregation, he simultaneously claims that he was authorized by New York Correction Law § 140 (McKinney 1968) to confine plaintiff to punitive segregation for the period of time, and under the conditions, which he did. Consequently, says the Warden, "it would be untenable if a state official were forced to pay damages for exercising his duty under a valid state statute." (Reply Brief of Defendants at 40). This statute provides:

> *Solitary confinement on short rations.*
>
> If in the opinion of the warden of such prison it shall be deemed necessary, in any case, to inflict unusual punishment in order to produce the entire submission or obedience of any prisoner, it shall be the duty of such warden to confine such prisoner immediately in a cell, upon a short allowance, and to retain him therein until he shall be reduced to submission and obedience. The short allowance of each prisoner so confined shall be prescribed by the physician, whose duty it shall be

> to visit such prisoner and examine daily into the state of his health until the prisoner be released from solitary confinement and returned to his labor.

There is nothing in this statute which authorized Follette to punish plaintiff for exercising his constitutional rights.[18] Even defendants do not claim that under this statute the Warden could put a prisoner into solitary confinement or punitive segregation for something which he allegedly did but which was not in fact done, or which was a violation of a constitutionally invalid rule. In order for this statute to remain constitutional, it must be construed to authorize solitary confinement or punitive segregation for no more than 15 days for serious infractions of the rules and after hearing and determination in accordance with the minimum procedural due process requirements set forth above. The American Correctional Association, *Manual of Correctional Standards* 414-415 (3rd ed. 1966).

The court will retain jurisdiction of this case to give defendants Follette, McGinnis, and Mancusi an opportunity to submit, for approval by this court, the proposed rules required by this opinion. Such proposal shall be submitted on or before the expiration of 90 days from the filing of the court's order in accordance with this opinion. Plaintiff shall have 30 days, thereafter, to file any objections thereto, after which the court will determine whether any further hearing is required before final approval.

Dated: New York, New York
May 14, 1970

CONSTANCE BAKER MOTLEY,
U.S.D.J.

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Footnotes

[1] Jurisdiction is also predicated on 28 U.S.C. § 1331. Plaintiff refers to himself in the complaint as an "Afro-American citizen of the United States."

[2] If there is substance to plaintiff's allegations in *Wright* v. *McMann*, 387 F. 2d 519 (2d Cir. 1967), then Sostre's reform efforts have failed to eliminate the more outrageously inhumane aspects of solitary confinement at all of New York's prisons.

[3] Sostre has a defense committee which is apparently working for reversal of his conviction. (Pl. Exh. 29).

[4] The Warden, prior to trial, claimed that possession of the enemy paper was one of the five reasons why Sostre was sent to solitary but on the trial he modified this, defendants claim, to the three reasons set forth above. (Def. Reply Brief, at 8-9; T. 1248-1249).

[5] *See Generally*, Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 Harv. L. Rev. 635 (1966).

[6] Sostre filed his original complaint, *pro se*. Defendants moved to dismiss. That motion was denied by this court (Croake, J.) on February 4, 1969. Thereafter, Sostre filed another set of motion papers on April 29, 1969, in which he sought an order restraining the Warden from refusing to mail a letter for him to the United States Supreme Court, from obstructing the mailing of a "reply to this court" (presumably in the very action now decided), and from refusing to release a letter sent by plaintiff to his attorney on April 3, 1969.

Judge Tenney found on the basis of the papers before him (there was no hearing) that the Warden had neither obstructed nor interfered with any of plaintiff's letters, and denied plaintiff's motion in all respects. See order of September 19, 1969. That order was entered after the preliminary injunction issued on August 1, 1969.

In support of his decision, Judge Tenney cited the following declaration in Warden Follette's affidavit to the court of May 20, 1969 (introduced in evidence on the trial of this action, Pl. Exh. 39):

> "No mail sent by plaintiff has been obstructed at any time by the staff of this institution. On the contrary, every piece of mail given by plaintiff to be mailed from this prison has been so mailed. . . ."

The affidavit continues three paragraphs later: ". . . At no time was any such correspondence [to and from plaintiff's attorney] impeded by anyone on the staff of this institution, except to examine

the contents in accordance with the rules of the Department of Correction." Warden Follette testified on this trial that the affidavit was "inaccurate" (T. 1288-1292) and that it should have contained a declaration to the effect: "That no mail which he could legally mail from the prison in accordance with the New York State Department of Correction rules and with recent court decisions" had been obstructed. (T. 1290).

[7] Pl. Exh. 22C, F, and G.

[8] The case is not dismissed as to any of the remaining defendants. The Commissioner has the power to re-transfer Sostre to Attica Prison, where defendant Mancusi is the Warden. Defendant McGinnis is the chief executive officer of the state's prison system. He was made aware of everything which was happening to Sostre by Warden Follette. (T. 692-700; Pl. Exh. 29, 29-A-F). Although he had the power to do so, McGinnis took no action with respect to Sostre's confinement or the conditions in punitive segregation at Green Haven. Therefore, the case is not dismissed as to him.

[9] Amended Complaint, para. 4; T. 703-704.

[10] It should be noted that the Amended Complaint also predicates jurisdiction on 28 U.S.C. § 1331. (Amended Complaint, para. 1).

[11] *But see Law Students Civil Rights Research Council, Inc.* v. *Wadmond*, 299 F. Supp. 117 (S.D.N.Y. 1969) (three-judge court), where the court held that the Appellate Division judges may be enjoined from enforcing an unconstitutional state statute. *Id.* at 123.

[12] But as pointed out above, an injunctive order or judgment for damages may be unenforceable without a specific agent or agency against whom such order or judgment may be enforced.

[13] The Second Circuit's recent requirement set forth in dicta in *Eisen* v. *Eastman*, *supra*, of exhaustion of an "adequate" administrative remedy in an action properly brought under Section 1983, is apparently reached without taking judicial notice of the fact that the Supreme Court's decisions (which it cites in that opinion) which hold that state administrative remedies need not be exhausted before resort to a federal court under Section 1983, did not so hold without long and careful consideration of the effect of the exhaustion doctrine upon civil rights cases. Comment, *Section 1983 Jurisdiction: A Reply*, 83 Harv. L. Rev. 1352, 1358 (1970); Note, *Limiting the Section 1983 Action in the Wake of Monroe* v. *Pape*, 82 Harv. L. Rev. 1486, 1498-1501 (1969). The requirement of exhaustion of administrative remedies is a doctrine of judicial administration founded upon a desire to have an efficient administration of justice.

C. Wright, *Federal Courts* § 59 (2d ed. 1970). The doctrine was originally limited to rate making cases. And as a result of this doctrine, the federal courts avoided a flood of tedious and burdensome litigation without any significant damage to the petitioners.

Soon after federal jurisdiction was successfully invoked in what was to usher in four decades of litigation in the federal courts to secure for American Negroes those rights guaranteed them by the Constitution and laws of the United States, *Alston* v. *School Board of City of Norfolk*, 112 F. 2d 992 (4th Cir.), *cert. den.* 311 U. S. 693 (1940), the doctrine of exhaustion of administrative remedies was applied to such cases. *Cook* v. *Davis*, 178 F. 2d 595 (5th Cir. 1949), *cert. den.* 340 U. S. 811 (1950); *Bates* v. *Batte*, 187 F. 2d 142 (5th Cir.), *cert. den.* 342 U. S. 815 (1951); *Carson* v. *Board of Education of McDowell County*, 227 F. 2d 789 (4th Cir. 1955), *mandamus denied on same ground sub nom. Carson* v. *Warlick*, 238 F. 2d 724 (4th Cir. 1956), *cert. den.* 353 U. S. 910 (1957).

This frustrating roadblock to the federal courts in civil rights cases was finally removed by the Supreme Court in *Monroe* v. *Pape*, 365 U. S. 167 (1961), more than a decade after *Cook* v. *Davis*, *supra*, during which the requirement became increasingly more burdensome: *Carson* v. *Warlick*, *supra*. Comment, *Exhaustion of State Remedies Under The Civil Rights Act*, 68 Colum. L. Rev. 1201, 1207 &n. 42 (1968). The cost to petitioners of these resultant delays can be seen in *Griffin* v. *Prince Edward County*, 377 U. S. 218 (1964), where, when the case reached the Supreme Court, the public schools had already been closed for 5 years. This is hardly the time for another retreat from prompt federal enforcement of civil rights and personal liberties.

"The commissioner of correction is the chief executive officer of the department of correction and is in sole charge of the administration of that department. N. Y. Correction Law § 5 (McKinney 1968). He appoints the warden of each state prison, who is subject to the rules and statutory powers of the commissioner and who, in directing the officers and employees in his prison, is also subject to the direction of the commissioner. *Id.* § 18.

The commissioner is also chairman of the state commission of correction, which is charged with the visitation and inspection of state prisons. N. Y. Correction Law § 16(1), (2) (McKinney 1968). Specifically, and of most importance here:

> The state commission of correction shall visit and inspect all institutions used for the detention of sane adults . . . convicted of crime, . . . and, *subject to the direction and control of the commissioner of correction*, shall:
>
> 1. Aid in securing the just, humane and economic administration of all institutions subject to its supervision.
>
> * * *

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"3. Secure the best sanitary conditions . . . and protect and preserve the health of the inmates.

Id. § 40 (Emphasis added)."

There is no plain, adequate or speedy administrative remedy whereby a prisoner sent to punitive segregation for an alleged infraction of the rules may have his grievance remedied nor is there such a remedy for claims of racial segregation, as here alleged. If an inmate believes an order to be unjust or has any complaint concerning an order or desires to complain concerning any action, he notifies a staff officer who notifies the Principal Keeper at the earliest opportunity. (Rule 5, Inmates' Rule Book, Pl. Exh. 19. "The rule book states that he can address himself to the deputy warden, the warden, and he may ask for and receive a letterhead to send a letter to the Commissioner." (Follette Dep. at 147; Pl. Exh. 38A; T. 1,244).

When an inmate violates a prison rule, it is reported by an officer to the deputy warden. (Follette Dep. at 10, Pl. Exh. 38B). The deputy warden speaks to the inmate in the presence of a sergeant and perhaps other officers, but the inmate has no opportunity to confront his accuser. The Warden testified: It "would be degrading to the officer" to have him present. (Follette Dep. at 12-13, Pl. Exh. 38B).

The defendant Commissioner furnished the following information under oath:

"6. . . . There is also a Review Board in the Central Office of the Department of Correction that reviews all cases involving infractions of rules and punishment where such punishment is 30 days or more. The Review Board is authorized to judge the determination made by the warden in all inmate disciplinary matters.

* * *

7. . . . [A]ll punishment which is imposed in excess of 30 days or where a privilege is withheld for 30 days or more must be referred to the Commissioner. By this means we standardize as much as possible punishments for a similar violation in all of the institutions.

Answer to Interrogatories of Paul D. McGinnis, Pl. Exh. 28 at 2, 3.

There is no codified regulation or provision creating a Review Board, nor is there any indication of what procedures, if any, are followed by any such Board. Warden Follette was explicitly questioned as to whether a Review Board had been set up in Sostre's case. He testified that he did not know if one had been set up, and that no one "communicated with [him] on the Sostre case as to his confinement in segregation." (T. 700).

Moreover, defendants do not claim that Sostre's confinement in segregation was in fact reviewed by the Commissioner. In rebutting plaintiff's claim that he had no right of appeal from the disciplinary proceeding, defendants merely point to a rule which permits a prisoner to write a letter requesting an audience with the Warden or Commissioner of Correction. (Reply Brief of Defendants at 32, citing Rule 14, Inmates' Rule Book, Pl. Exh. 1).

Where a prison board withholds the allowance of reduction of sentence for good time, such action must be reported to the commissioner of correction with reasons therefor. N. Y. Correction Law § 230 (McKinney 1968); 7 N. Y. Codes, Rules, & Regulations, *Correction* § 60.4(e) (1963) [hereinafter referred to as 7 N.Y.C.R.R.]. Although such action "shall be deemed a judicial function and shall not be reviewable if done according to law," N. Y. Correction Law § 230 (McKinney 1968), it "shall be reviewable by the Commissioner of Correction." 7 N.Y.C.R.R. § 60.4(e). Neither standards nor procedures of review are indicated. Such consideration of loss of good time takes place at the time of consideration of eligibility for parole.

Assuming that this last regulation *compels* the commissioner to review withholding of reduction of sentence, it can hardly be said that there is, therefore, an "administrative . . . body with an unmistakable mandate" to consider Sostre's complaints. *Wright* v. *McMann*, 387 F. 2d 519, 528 (2d Cir. 1967). (concurring opinion of Lumbard, C. J.). Furthermore, it is clear that taken in its most benign posture, 7 N.Y.C.R.R. § 60.4(e) does not apply to review of *other* forms of punishment—such as punitive segregation.

[15] Both parties have waived their right to a jury trial in this matter by not requesting a jury trial. Rule 38(d), Fed. R. Civ. P.

N. Y. Correction Law § 6-b (McKinney 1968) provides:

> No civil action shall be brought in any court against the commissioner or a deputy commissioner of correction or an officer or employee of a state prison or reformatory or institution for criminally insane or mentally defective persons in the department, in his personal capacity, for alleged damages because of any act done or failure to perform any act, while discharging his official duties, without leave of judge of a supreme court, first had and obtained. Any such officer or employee in any such action shall not be liable for damages if he shall have acted in good faith, with reasonable care and upon probable cause.
>
> Any just claim for damages against such commissioner, officer or employee for which the state would be legally or equitably liable, shall be brought and maintained in the court of claims as a claim against the state.

Appendix B:

N. Y. Court of Claims Act § 8 (McKinney 1963) provides:

> The state hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance with the same rules of law as applied to actions in the supreme court against individuals or corporations, provided the claimant complies with the limitations of this article. Nothing herein contained shall be construed to affect, alter or repeal any provision of the workmen's compensation law.

42 U.S.C. § 1988 provides:

> *Proceedings in Vindication of Civil Rights.*
>
> The jurisdiction in civil . . . matters conferred on the district courts by the provisions of this chapter, and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil . . . cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause. . . .

Plaintiff did not seek in this action to enjoin the enforcement of this statute on the ground of its repugnance to the Federal Constitution.

Appendix B.

Order of Motley, D.J., dated May 14, 1970.

ORDER.

In accordance with the opinion filed herein on May 14, 1970 embodying this court's findings of fact and conclusions of law;

It is now ORDERED, that defendants Follette, McGinnis and Marcusi, their employees, agents, successors, and all persons in active concert and participation with them, be, and they are hereby, perpetually enjoined and restrained from:

1) Returning plaintiff to punitive segregation for charges previously preferred against him;

2) Placing plaintiff in punitive segregation or subjecting him to any other punishment as a result of which he loses accrued good time credit or is unable to earn good time credit, without:

a. giving him, in advance of a hearing, a written copy of any charges made against him, citing the written rule or regulation which it is charged he has violated;

b. granting him a recorded hearing before a disinterested official where he will be entitled to cross-examine his accusers and to call witnesses on his own behalf;

c. granting him the right to retain counsel or to appoint a counsel substitute;

d. giving him, in writing, the decision of the hearing officer in which is briefly set forth the evidence upon which it is based, the reasons for the decision, and the legal basis for the punishment imposed.

3) Censoring, refusing to mail, or refusing to give to Sostre: 1) Any communication between Sostre and the following—(a) any court; (b) any public official or agency; (c) any lawyer; (d) his codefendant in the criminal matter pending against him; and, 2) Any letter relating to any legal matter to or from any other inmate who requests the assistance to Sostre in translating that letter into English.

4) Punishing Sostre for sharing with other inmates his law books, law reviews, and other legal materials, and from refusing to permit Sostre to assist any other inmate in any legal matter as long as defendants have not provided any court approved alternative means of legal assistance for such inmates.

5) Punishing Sostre for having in his possession political literature and for setting forth his political views orally or in writing, except for violation of reasonable rules approved by the court regulating freedom of speech.

It is further ORDERED that the above named defendants submit, within 90 days from the date of this order, for approval by this court, proposed rules and regulations governing the following:

1) the receipt, distribution, discussion and writing of political literature;

2) all future disciplinary charges and hearings with respect thereto where the possible punishments include solitary confinement, punitive segregation or any other segregation, and any other punishment in connection with which there is loss of, or inability to earn, good time credit.

It is further ORDERED that the above named defendants and their agents credit plaintiff with the 124 1/3 days of good

time credit which he was unable to earn while wrongfully incarcerated in punitive segregation from June 25, 1968 to July 2, 1969.

It is further ORDERED that the plaintiff, Martin Sostre, recover of the defendants, Warden Follete, and Commissioner McGinnis the sum of $13,020.00.

The court retains jurisdiction.

Dated: New York, New York, May 14, 1970.

SO ORDERED:

CONSTANCE BAKER MOTLEY,
U.S.D.J.

Appendix C.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

68 Civil 4058

MARTIN SOSTRE,

Plaintiff,

against

NELSON A. ROCKEFELLER, Governor of the State of New York, PAUL D. McGINNIS, Commissioner of Correction, of the State of New York, VINCENT MANCUSI, Warden of Attica Prison, and HAROLD W. FOLLETTE, Warden of Green Haven Prison,

Defendants.

MEMORANDUM OPINION AND ORDER DATED JUNE 12, 1970
CONSTANCE BAKER MOTLEY, D. J.

This court entered an order in this case on May 14, 1970. Immediately thereafter, defendants filed a notice of appeal. In an affidavit dated May 25, 1970 defendants applied for the following relief:

1) A stay of this court's order and decision, dated May 14, 1970, pending the outcome of an appeal to the Court of Appeals for the Second Circuit (Rule 62, Fed. R. Civ. P.);

2) Permission for the defendants to prosecute this appeal without filing a bond for costs on appeal (Rule 7, Fed. R. of App. P.);

3) A new trial or an amendment or alteration of the judgment of this court on behalf of defendant Follette and defendant Mancusi (Rule 59, Fed. R. Civ. P.).

Plaintiff opposed the granting of a stay as to all parts of the order except the award of damages. He further

opposed the application for a stay on the ground that: 1) no motion for a stay had been made as required by Rule 7(b)(i) Fed. R. Civ. P.; 2) that part of the court's order requiring defendants to submit proposed rules relating to political literature and disciplinary hearings was not a final order and, therefore, not appealable; 3) a stay of the order which permanently enjoins defendants from returning Sostre to punitive segregation would put Sostre in a worse position than he was before trial since this court had issued a preliminary injunction releasing Sostre from segregation pending trial; 4) neither a new trial nor an amendment of the judgment could be granted at this time since defendants have appealed.

In defendant's reply affidavit, dated June 3, 1970, they requested that the court treat their May 25th affidavit as a formal motion under Rule 7(b)(1), Fed. R. Civ. P. Defendants further request that the court certify that the interlocutory portions of its order of May 14, 1970, involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, thus allowing an appeal under 28 U.S.C. § 1292(b). Rule 5, Fed. Rules of App. P.

The court held a recorded hearing on defendants' request for a stay on June 10, 1970.

The court cannot comprehend why defendants have chosen twice to make motions before this court by way of affidavits and reply affidavits, rather than by way of notice of motion in conformity with Rule 7(b)(1). But the court sees no prejudice to plaintiff; therefore, the court will ignore these formal defects. Rule 1, Fed. R. Civ. P.

The court grants defendants' request for a stay as to the following provisions of this court's May 14, 1970 order on the condition that defendants perfect their appeal (which includes the filing of their brief on appeal) within

45 days from June 11, 1970:

> "It is now ORDERED, that defendants Follette, McGinnis and Mancusi, their employees, agents, successors, and all persons in active concert and participation with them be, and they are hereby, perpetually enjoined and restrained from:
>
> "3) Censoring, refusing to mail, or refusing to give to Sostre: 1) Any communication between Sostre and the following—(a) any court, (b) any public official or agency; (c) any lawyer; (d) his codefendant in the criminal matter pending against him; and, 2) Any letter relating to any legal matter to or from any other inmate who requests the assistance of Sostre in translating that letter into English.
>
> "5) Punishing Sostre for having in his possession political literature and for setting forth his political views orally or in writing, except for violation of reasonable rules approved by the court regulating freedom of speech."

The stay is granted as to paragraph 3 since, as defendants point out, they are presently operating as to all other prisoners under the majority opinion in *Brabson* v. *Wilkins*, 19 N. Y. 2d 433 (1967), whereas this court adopted the minority view in that case. And since this court found no controlling federal decision on point, it appears that the decision here as relates to paragraph 3 is new. When a new or novel question is presented, a stay is proper. The same principle applies to paragraph 5.

The court also grants a stay as to the following:

> "It is further ORDERED that the above named defendants submit, within 90 days from the date of this order, for approval by this court, proposed rules and regulations governing the following:

"1) the receipt, distribution, discussion and writing of political literature;

"2) all future disciplinary charges and hearings with respect thereto where the possible punishments include solitary confinement, punitive segregation or any other segregation, and any other punishment in connection with which there is loss of, or inability to earn, good time credit."

Plaintiff's counsel has advised the court that a motion to dismiss the appeal on the ground that the preceding portions of the order are interlocutory and non-appealable will be filed in the Court of Appeals. Certainly, the first question on any appeal is whether the order is appealable. The stay of this part of the order is, therefore, granted pending disposition of the motion to dismiss the appeal. If this part of the order should be held appeable, then the granting of the stay will be in effect pending appeal, subject to the condition set forth herein. The stay is granted as to the foregoing portions of the order requiring submission of rules not because the requirement that new rules should be submitted is unique but because the subject matter, political literature and disciplinary hearings, as to which new rules are required, is new. There is no basis for a certificate under 28 U.S.C. 1292(b) as to the preceding portions of the court's order since an appeal has already been taken.

Plaintiff has consented to a stay on the following part of the court's order:

"It is further ORDERED that the plaintiff, Martin Sostre, recover of the defendants, Warden Follette, and Commissioner McGinnis the sum of $13,020.00."

The court denies the stay as to that part of the permanent injunction that enjoins and restrains defendants from:

"1) Returning plaintiff to punitive segregation for charges previously preferred against him;

"2) Placing plaintiff in punitive segregation or subjecting him to any other punishment as a result of which he loses accrued good time credit or is unable to earn good time credit, without:

"*a.* giving him, in advance of a hearing, a written copy of any charges made against him, citing the written rule or regulation which it is charged he has violated;

"*b.* granting him a recorded hearing before a disinterested official where he will be entitled to cross-examine his accusers and to call witnesses on his behalf;

"*c.* granting him the right to retain counsel or to appoint a counsel substitute;

"*d.* giving him, in writing, the decision of the hearing officer in which is briefly set forth the evidence upon which it is based, the reasons for the decision, and the legal basis for the punishment imposed."

The court also denies the stay as to that part of the order which enjoins defendants from:

"4) Punishing Sostre for sharing with other inmates his law books, law reviews, and other legal materials, and from refusing to permit Sostre to assist any other inmate in any legal matter as long as defendants have not provided any court approved alternative means of legal assistance for such inmates."

In addition, the court denies the stay as to the following:

"It is further ORDERED that the above named defendants and their agents credit plaintiff with the 124⅓ days of good time credit which he was unable

to earn while wrongfully incarcerated in punitive segregation from June 25, 1968 to July 2, 1969."

The court denies the requested stay as to paragraph 2 of the order, *supra,* on the ground that defendants have failed to show any likelihood of reversal on appeal as to that part of the order in view of the Supreme Court's holding in *Goldberg* v. *Kelly,* 397 U. S. 254 (1970) and the 2nd Circuit's ruling in *Escalera* v. *New York City Housing Authority* (Nos. 33226-33229) (2d Cir. April 29, 1970).

In addition, it appears that defendants may shortly proceed to place plaintiff in solitary confinement or punitive segregation again as evidenced by the very serious charges made for the first time against Sostre and contained in a letter addressed to the court by defendants' counsel dated June 5, 1970, which reads as follows:

Dear Judge Motley:

On June 4, 1970 we received a letter from Warden Charles L. McKendrick, in which he advises us of the following situation at Wallkill Prison. We believe this information should be considered in connection with our motion for a stay of Your Honor's decision pending appeal.

In the past few weeks, Sostre has been doing exactly what he pleases, including walking off his job and holding meetings with other inmates in the galleries, corridors and lavatories. The administration has been virtually powerless to restrain him in each and every instance because of the disciplinary procedures that Your Honor's order of May 4, 1970 has imposed on the defendants.

Sostre seems to have a dominant and leading role in two identifiable groups of subordinates:

(1) a group of militant, aggressive, physically strong black inmates who follow his directions and pay obeisance;

(2) a second group of weak, submissive, unstable inmates, often white or light skinned.

In the past week it has been necessary for the Warden to request the transfer of seven prisoners whose conduct, suspicious behavior and subservience to Sostre have clearly indicated their unsuitability for continuance in a medium security prison. The Warden has also requested the Commissioner of Correction to supply him with additional uniformed officers in order to protect the institution from violence or disruptive activity. The Warden has advised us that if the present situation continues, it would be his judgment at this time that the Commissioner of Correction would be wholly justified in the closing of Wallkill Prison.

There are many inmates at Wallkill Prison who desire to benefit from the training courses there, and who are appreciative of the programs and the liberal visiting privileges. The Warden informs us that they are becoming increasingly distressed in having Martin Sostre among them, who cannot be disciplined in the same manner as are other prisoners.

We enclose for your information a sworn statement by the supervisor of the prison laundry, where Sostre is employed.

In view of the seriousness of the situation, we would appreciate an early disposition of our pending motions.

Sincerely yours,

Louis J. Lefkowitz
Attorney General
By
Hillel Hoffman
Assistant Attorney General

HH:bm
Enc.

Appendix C.

If the court would grant a stay as to paragraph 2 of its order, then plaintiff would be in danger of being returned to punitive segregation during the pendency of this appeal without the minimum procedural safeguards required by this court's opinion and order. The introduction of the letter and attached affidavit have only one obvious purpose and that is to prejudice this court and any reviewing court against Sostre. The letter was manifestly designed to undercut the court's findings of fact in its opinion as to Sostre being on good terms with the prison officials at Wallkill Prison. This court's order plainly does not prevent proper disciplining of Sostre.

Defendants have permission to prosecute this appeal without bond.

The court is without jurisdiction to grant a new trial, to amend or alter the judgment because defendants have already filed a notice of appeal. The request for a new trial as to defendant Follette on the ground that he died just shortly before the court entered its order of May 14, 1970 is in any event without merit. His successor is automatically substituted. Rule 25, Fed. R. Civ. P. The plaintiff may submit an order for the court's approval substituting Follette's successor as a defendant in this case when a successor is appointed.

Dated: New York, New York
June 12, 1970.

So ordered

Constance Baker Motley,
U. S. D. J.

Appendix D.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

68 Civil 4058

MARTIN SOSTRE,

Plaintiff,

against

NELSON A. ROCKEFELLER, Governor of the State of New York, PAUL D. McGINNIS, Commissioner of Correction, of the State of New York, VINCENT MANCUSI, Warden of Attica Prison, and HAROLD W. FOLLETTE, Warden of Green Haven Prison,

Defendants.

MEMORANDUM OPINION ON MOTION FOR PRELIMINARY INJUNCTION, OF THE DISTRICT COURT (MOTLEY, D. J.), DATED SEPTEMBER 4, 1969*

Plaintiff, an inmate at Green Haven Prison, moved for a preliminary injunction pursuant to Rule 65, Fed. R. Civ. P., to restrain defendants from keeping him in the punitive segregation unit of the prison on account of disciplinary charges made against him more than a year ago. Plaintiff alleged violations of his Fifth and Eighth Amendment constitutional rights. This court, in accordance with its previously filed findings of fact, has concluded that plaintiff is entitled to a preliminary injunction.

Plaintiff was placed in the segregation unit of the prison on June 25, 1968, because of disciplinary infractions. These

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* This opinion is reported at 309 F. Supp. 611.

infractions consisted of "threats and boasts that he would escape from the custody of correctional authorities; the presence of contraband material in his cell, consisting of two large pieces of emery board, adaptable for the fashioning of a key or lock picking tool; and disposing of his personal law books to other prisoners in violation of [prison] regulations;" as well as refusing to answer "questions put to him by prison authorities regarding his alleged recruitment of other prisoners for an organization suspected to be fomenting insurrection within [the] institution;" "engaging in unlawful correspondence by mail with unknown persons;" and "preparing legal papers on behalf of one Geraldine Robinson." (Warden's affidavit, pp. 2-3.)

Prisoners placed in segregation are required to participate in group counseling, but plaintiff has continually refused. The recommendation of the group counselor is given serious weight by the Warden in determining whether such prisoners may be returned to the general prison population. (Warden's affidavit, p. 3.)

Plaintiff remained in the segregation unit until returned to the general population pursuant to the temporary restraining order of this court dated July 2, 1969.

The conditions in the segregation unit are such that prisoners in that unit: 1) have no work program of any kind; 2) do not have access to the library, motion pictures, television, or other recreational facilities available to other prisoners; 3) are permitted to bathe and shave once a week; 4) are not allowed to read newspapers or magazines; 5) are confined to their cells 23 hours a day with only one hour of exercise time which is permitted only on condition that the prisoners undergo a thorough physical examination each day; 6) are awakened at half-hour intervals during the night by a guard who patrols the unit; and 7) are confined in a cell which has no natural daylight and which has an electric light which cannot be turned on or off from within the cell.

Appendix D.

This court has jurisdiction over this action pursuant to 28 U.S.C. § 1343 (3) and 42 U.S.C. § 1983. Those statutes entail no requirement that state remedies, administrative or judicial, be exhausted before seeking relief in this court. *Houghton* v. *Shafer*, 392 U. S. 639 (1968); *Monroe* v. *Pape*, 365 U. S. 167 (1961); *Wright* v. *McMann*, 387 F. 2d 519, 524 (2d Cir. 1967).

A preliminary injunction is an extraordinary remedy which should be issued only upon a clear showing of probable success and possible irreparable injury to the moving party. *Checker Motors Corporation* v. *Chrysler Corporation*, 405 F. 2d 319, 323 (2d Cir. 1969); *Dino de Laurentiis Cinematografica, S.p.A.* v. *D-150, Inc.*, 366 F. 2d 373, 375 (2d Cir. 1966). "However, 'the burden [of showing probable success] is less where the balance of hardships tips decidedly toward the party requesting the temporary relief.' *Dino de Laurentiis Cinematografica, S.p.A.* v. *D-150, Inc.*, *supra*, at 375." *Checker Motors Corporation* v. *Chrysler Corporation*, *supra*, 405 F. 2d 323.

In the instant case, there has been no showing that release of the plaintiff from the segregation unit pending trial of this action will in any way undermine prison discipline or interfere in any respect with prison administration. The physical and psychological harm to the plaintiff, on the other hand, from continued confinement in the segregation unit for which there can be no adequate monetary or other compensation, increases daily. Moreover, plaintiff has demonstrated a clear probability of success upon a final determination of the merits of this case.

The court finds plaintiff's Eighth Amendment claim sufficient in and of itself to warrant the issuance of a preliminary injunction without considering plaintiff's Fifth Amendment claim. Punishment totally disproportionate to the offenses charged has been violative of the Eighth Amendment's prohibition against cruel and unusual punishment. *Weems* v. *United States*, 217 U. S. 349,

367 (1910); *United States* v. *Watson*, —— F. 2d —— (D. C. Cir. 1968); *Fulwood* v. *Clemmer*, 206 F. Supp. 370 (D. C. D. C. 1962); see also *Gallego* v. *United States*, 276 F. 2d 914 (9th Cir. 1960).

In *Weems*, the Supreme Court struck down a sentence of fifteen years imprisonment at "hard and painful labor" imposed under Philippine law for the offense of falsifying a public document to conceal a minor misuse of public funds. That sentence for such an offense was found "cruel in its excess of imprisonment" as well as "unusual in its character," 217 U. S. at 377, for it is a "precept of justice that punishment for crime should be graduated and proportioned to the offense," 217 U. S. at 367.

In speaking of *Weems*, the Court later said in *Trop* v. *Dulles*, 356 U. S. 86 (1958):

> "The Court recognized in that case that the words of the Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." 356 U. S. at 100-101.

In *Trop*, four judges held that denationalization as a punishment is barred by the Eighth Amendment.

The District of Columbia Circuit in *Watson* v. *United States*, —— F. 2d —— (D. C. Civ. 1968), in holding excessive a minimum ten-year sentence imposed for possession of drugs by a narcotics addict, looked to the idea of excessiveness in *Weems* and to that of evolving standards of decency in *Trop*, as well as to the fact that state legislatures are prohibited by the Eighth Amendment from making addiction a crime. *Robinson* v. *California*, 379 U. S. 660 (1962). As a result, the court explained that although some punishment of an addict's use may be permissible, any such punishment lies close to the

line of unconstitutionality. "Where the Eighth Amendment barely permits *any* punishment of an offense, it may reasonably be thought to set relatively strict limits on the amount of punishment which may be imposed," —— F. 2d at —— (4 Cr. L. 3054). The sentencing scheme in *Watson* was found to create an unconstitutional situation where a convicted murderer, kidnapper, arsonist, rapist, traitor, robber, or saboteur might receive a lighter sentence than is mandatorily imposed on an addict who possesses narcotics more than once. *Id.*

The imposition of punishment grossly disproportionate to the offense was also found violative of Eighth Amendment standards in *Fulwood* v. *Clemmer*, 206 F. Supp. 370 (D.C.D.C. 1962), a case quite similar to this one. There, a muslim prisoner had broken a prison rule, which forbade engaging in any demonstration of disturbance that would tend to breach the peace, by engaging in loud racial preaching within the hearing of white and Negro inmates on the prison recreation field. His punishment for this offense was segregation from the general inmate population in special control cells, much like the punitive segregation unit involved in the instant case, for more than two years. In finding this punishment unreasonably excessive, the court said:

> "Despite the power of prison authorities to make proper rules and regulations for the government of prisoners, and to maintain discipline in the prison population, a prisoner may not be unreasonably punished for the infraction of a rule. A punishment out of proportion to the violation may bring it within the bar against unreasonable punishments." 206 F. Supp. at 379. See also *Roberts* v. *Pegelow*, 313 F. 2d 548, 551 (4th Cir. 1963); *Gallego* v. *United States*, *supra*, 276 F. 2d 914 (9th Cir. 1960); *United States ex rel. Raymond* v. *Rundle*, 276 F. Supp. 637, 638 (E. D. Pa. 1967);

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United States ex rel. Hancock v. *Pate*, 223 F. Supp. 202, 205 (N. D. Ill. 1963); *cf. Robinson* v. *California*, *supra*, 370 U. S. 660, 676 (1962) (concurring opinion).

The court finds the situation in the instant case substantially parallel to that in *Eulwood* v. *Clemmer*. For that reason and for all the above reasons, plaintiff is entitled to the preliminary injunction issued by this court on August 1, 1969, restraining the defendant Follette from holding the plaintiff in punitive segregation, from segregating him from the general prison population, and from depriving him of the rights privileges, and customs enjoyed by the general prison population until a trial and determination of this action can be had.

Dated: New York, New York, September 4, 1969.

Constance Baker Motley,
CONSTANCE BAKER MOTLEY,
U.S.D.J.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. .....

PAUL D. MCGINNIS, Commissioner of Correction of the State of New York, and VINCENT MANCUSI, Superintendent of Attica Correctional Facility,

Petitioners,

against

MARTIN SOSTRE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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OCTOBER TERM, 1971

No. .....

PAUL D. McGINNIS,* Commissioner of Correction of the State of New York, and VINCENT MANCUSI, Superintendent of Attica Correctional Facility,

Petitioners,

against

MARTIN SOSTRE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review a portion of the decision of the United States Court of Appeals for the Second Circuit in the case of *Martin Sostre* v. *Paul D. McGinnis, et al.* This case was heard by the Court sitting *en banc* and was decided on February 24, 1971.

Opinions Below

The opinion of the Court of Appeals is reported at 442 F. 2d 178. It is filed with this petition as Appendix

* Paul D. McGinnis is no longer the Commissioner of Correction. However, he is included here as a petitioner because there has been no formal substitution of parties, and because respondent may seek to recover personal damages from McGinnis.

"A". The opinion of the United States District Court for the Southern District of New York, dated May 14, 1970, which was reviewed by the Court of Appeals, is reported at 312 F. Supp. 863. This opinion and the order entered thereon are filed herewith as Appendix "B".

The opinion of the District Court, dated June 12, 1970, determining petitioners' motion for a stay pending appeal to the Court of Appeals is not reported. It is filed herewith as Appendix "C". The opinion of the District Court, dated September 4, 1969, granting a preliminary injunction on behalf of respondent, is reported at 309 F. Supp. 611. It is filed as Appendix "D" to the petition.

Jurisdiction

The judgment of the Court of Appeals was entered on February 24, 1971. The order of that Court denying rehearing *en banc* was entered on April 8, 1971. The order of that Court denying partial reconsideration of its decision was entered on April 21, 1971. The order granting respondent's motion to stay the mandate of the Court of Appeals, subject to the 30 day limitation of Federal Rules of Appellate Procedure 41(b), was entered on May 24, 1971.

The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

Question Presented

Whether the Court of Appeals properly held that an inmate who maintains an action under Section 1983 of the Civil Rights Act for alleged unconstitutional treatment in a state prison, need not employ state legal or equitable remedies designed to deal with such treatment, where the state remedy is adequate as a condition to seeking affirmative relief in the federal courts?

Statutes Involved

42 U.S.C. § 1983.

"Civil Action For Deprivation of Rights

Every person who under color of any statute, ordinance, regulation, custom or usage, of any State or Territory subjects, or causes to be subjected, any citizen . . . or other person . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

N. Y. Correction Law, § 24 (McKinney 1971)

"No civil action shall be brought in any court against the commissioner or a deputy commissioner of correction or an officer or employee of a state prison or reformatory or institution for criminally insane or mentally defective persons in the department, in his personal capacity, for alleged damages because of any act done or failure to perform any act, while discharging his official duties, without leave of a judge of a supreme court, first had and obtained. Any such officer or employee in any such action shall not be liable for damages if he shall have acted in good faith, with reasonable care and upon probable cause;

Any just claim for damages against such commissioner, officer or employee for which the state would be legally or equitably liable, shall be brought and maintained in the court of claims as a claim against the state."

N. Y. Civil Rights Law, § 79-c (McKinney's 1971).

"A convict sentenced to imprisonment is under the protection of the law, and any injury to his person, not

authorized by law, is punishable in the same manner as if he were not sentenced or convicted.

Nothing in sections seventy-nine or seventy-nine-a of this chapter shall be deemed to deny a convict sentenced to imprisonment the right to injunctive relief for improper treatment where such treatment constitutes a violation of his constitutional rights."

Statement of the Case

A. Factual Background

Respondent, Martin Sostre, is a New York State prisoner who is serving a sentence of 30 to 40 years as a second felony offender. This sentence was imposed on March 18, 1968, by the County Court of Erie County, New York, upon Sostre's conviction for possession of a narcotic drug and assault upon a police officer.

Immediately after respondent was sentenced, he was taken to Attica Correctional Facility, Attica, New York. He remained overnight at Attica and was transported on the following day to Green Haven Correctional Facility, Stormville, New York. Upon his arrival at Green Haven respondent was placed in the segregation unit for three days and then released to the general population.

On June 25, 1968, the late Warden Follette called respondent to his office and questioned him about two matters. The first was respondent's preparation of a motion for change of venue for his former co-defendant, who had not yet been brought to trial. The second was a number of references in respondent's letters to an organization known as "R.N.A.", and a statement in one of respondent's letters that he would be leaving the institution soon, either by having his conviction reversed by the courts or by being liberated by the "Universal Forces of Liberation."

As a result of the Warden's inquiries, which provoked an altercation, Follette ordered that Sostre be placed in the punitive segregation unit of the prison. This unit consisted of ordinary size cells that were contiguous to each other, and contained ordinary furnishings. However, inmates confined to this unit were subjected to certain restrictions and loss of privileges.

Segregation inmates were unable to mingle with the general population, unable to work or participate in any programs, unable to use the prison library and unable to attend movies. They were restricted to one shower and shave per week with hot water, and one hour of exercise per day outside of their cells, after submitting to a rectal search. They were not permitted to read newspapers or periodicals, but only a few books that were previously selected for the segregation library. They were not permitted to receive second portions of food or desserts, but their diets were otherwise normal. They were entitled, however, to all legal materials and writing implements.

After respondent had been sent to the segregation unit by Follette, he refused to secure his release by assuring Follette that he would abide by the rules of the institution, or by participating in a lay therapy program. Respondent was unable to earn good time credit during this period because he could not participate in any programs. Follette censored respondent's mail to and from his attorneys by excising anything which did not directly pertain to respondent's case.

In October, 1968, respondent commenced the instant lawsuit by filing a *pro se* complaint in the Southern District of New York. His first cause of action alleged primarily that he was denied rights under the Eighth and Fourteenth Amendments by having been placed in segregated confinement by Warden Follette. His second cause of action alleged that Warden Follette had interfered unlawfully with his mail, and that petitioner Mancusi and his agents had

refused to mail a legal document of his to a court, while he was at Attica. His third cause of action alleged that Governor Rockefeller, former Commissioner McGinnis, Warden Follette and Superintendent Mancusi, conspired to maintain a racially discriminatory prison system in the State of New York in violation of his rights under the Thirteenth and Fourteenth Amendments, and that allegedly he was punished for speaking out against this system. Pursuant to 42 U.S.C. § 1983, he sought injunctive relief and damages from the defendants in their official capacities.

On February 4, 1969, the Southern District Court (CROAKE, D.J.), denied a motion by the defendant state officials to dismiss the complaint. On July 2, 1969, the Southern District Court (MOTLEY, D.J.) issued an order restraining Warden Follette from holding respondent in segregated confinement. On July 31, 1969, the District Court (MOTLEY, D.J.) issued a preliminary injunction against Warden Follette on behalf of respondent, and advanced the case for trial. On September 4, 1969, the District Court rendered a memorandum opinion in support of its issuance of preliminary injunction (309 F. Supp. 611) (Appendix "D").

After he was released from segregated confinement, respondent was disciplined at Green Haven for possessing handwritten political literature which the prison authorities determined to be "racist." Shortly thereafter, in August, 1969, respondent was transferred to Wallkill Correctional Facility, a medium security institution, where he has remained until the present time.

A non-jury trial on respondent's complaint was commenced in the District Court (MOTLEY, D.J.) on October 29, 1969 and concluded on November 7, 1969. The District Court reserved decision pending the filing of briefs and conclusions of fact and law.

B. The Decision of the District Court

The District Court handed down a comprehensive opinion and order on May 14, 1970 (312 F. Supp. 863) (Appendix "B"). It held that respondent's rights under the First, Eighth and Fourteenth Amendments were violated, and it awarded respondent punitive and compensatory damages against both Warden Follette and Commissioner McGinnis. It ordered that the good time credit which respondent was unable to earn while in segregation, be restored to him.

The District Court found that respondent was improperly punished for expressing his political beliefs, and was subjected to cruel and unusual punishment by reason of the length of his segregated confinement and the conditions of such confinement. It imposed a limit on segregated confinement of fifteen days.

The District Court set down certain requirements for prison disciplinary proceedings involving respondent where loss of good time credit or segregated confinement was concerned, and it ordered the defendant officials to submit rules on disciplinary proceedings for its approval. The District Court enjoined the prison officials from censoring respondent's mail to courts, public agencies and attorneys, and it enjoined the prison officials from preventing respondent from rendering legal assistance to other inmates until the official provided a court-approved means of legal assistance. The District Court also enjoined the defendant from disciplining respondent for possessing political literature except in accordance with regulations approved by the Court.

The cause of action relating to Governor Rockefeller was dismissed, but the Court retained jurisdiction over the remainder of the action.

On June 12, 1970, the District Court entered a memorandum opinion and order staying certain portions of

its decision pending appeal (Appendix "C"). However, it declined to stay the portion of its injunction which required the defendants to give respondent notice of charges, confrontation of witnesses, right to counsel or counsel-substitute, and a written determination in disciplinary proceedings involving punitive segregation or loss of good time. This provision of the District Court's order was stayed by the Court of Appeals for the Second Circuit on July 10, 1970, except in cases where respondent was sentenced to segregation for more than three days at one time or more than a total of ten days pending the appeal.

C. The Decision of the Court of Appeals

The Court of Appeals heard argument in this case on October 21, 1970, sitting *en banc*. On February 24, 1971, it rendered an extensive decision, with two judges concurring, two judges concurring in part and dissenting in part, and two judges dissenting (Appendix "A").

At the outset, without elaboration, the majority held that exhaustion of state legal or equitable remedies was not necessary to maintain an action under 42 U.S.C. § 1983. The majority cited this Court's decisions in *McNeese* v. *Board of Education*, 373 U. S. 668 (1963), *King* v. *Smith*, 392 U. S. 309 (1968), and *Damico* v. *California*, 389 U. S. 416 (1967), and cited its own decision in *Wright* v. *McMann*, 387 F. 2d 519 (2d Cir. 1967).

The majority agreed with the finding of the District Court that Warden Follette improperly punished respondent by placing him in the segregation unit and then disciplining him for possessing political literature after his release from segregation. However, it disagreed with the District Court's conclusion that the length of respondent's confinement and the conditions of his confinement constituted cruel and unusual punishment, and it set aside the fifteen day time limit on segregation which had been established by the District Court.

The majority opinion rejected the procedural elements which the District Court required in prison disciplinary proceedings involving loss of good time credit or segregated confinement, and it vacated the requirement that the prison officials submit rules on disciplinary proceedings for the court's approval. It held instead that inquiries into misconduct would be minimally fair if the inmate was afforded notice of charges and the evidence against him, an opportunity to explain his behavior, and a reasonable investigation into the relevant facts.

With regard to possession of literature, the majority upheld the District Court to the extent that respondent could not be punished for possessing any literature except in accordance with reasonable regulations. However, the majority vacated the requirement that such regulations be submitted for the District Court's approval.

On the issue of mail censorship the majority affirmed the order of the District Court to the extent that respondent was permitted to correspond freely with courts, public officials and attorneys unless he abused the privilege. On the issue of legal assistance the majority affirmed the decision of the District Court in principle, but reversed the order of the District Court permitting respondent to render legal assistance to other inmates, on the ground that respondent had not sought permission from the Warden to give such assistance.

The majority affirmed the restoration of respondent's good time credit by the District Court, and affirmed in principle the award of compensatory damages (but not punitive damages) against Warden Follette. However, it noted that no party had been substituted for Follette and therefore no one was before the Court to pay the damage award.*

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* Follette died prior to the entry of judgment in the District Court, and no substitution of his estate was made by respondent

(*footnote continued on following page*)

The majority vacated the damages against Commissioner McGinnis and dismissed the action against petitioner Mancusi.

Former Chief Judge Lumbard concurred in the result but expressed the view that the majority should not have intimated what was required in disciplinary proceedings involving loss of good time credit. Judge Waterman concurred in the result but stated that the majority opinion should not be construed as a denial of federal judicial concern for the due process rights of state prisoners.

Judge Smith and Judge Feinberg concurred in most aspects of the majority opinion, but they each wrote dissenting opinions on the issues of cruel and unusual punishment and the liability of Commissioner McGinnis to respondent for damages.

Judge Hays and Judge Moore dissented on the ground that federal courts should refuse to interfere with the internal affairs of state prisons except in the most extreme cases which shock the conscience of the Court. Both judges believed that the trial court should have been reversed with respect to all relief granted.

Subsequent to the Court's decision, respondent moved for rehearing *en banc*. This motion was denied on April 8, 1971. The *amicus curiae* NAACP Legal Defense Fund, which had been permitted to participate in oral argument, also applied for rehearing and partial reconsideration of the Court's decision. This motion was denied on April.

(*footnote continued from previous page*)

Sostre at that time (or any time), pursuant to New York law. Accordingly, the action against Follette abated, and the District Court improperly awarded damages against him. The affirmance of the damage award by the Court of Appeals was also improper, but since the Court of Appeals acknowledged that there was no party to recover the damages from, petitioners have refrained from raising the issue at this time.

21, 1971. On May 24, 1971 the Court of Appeals issued an order staying its mandate pending application by respondent to this Court for a writ of certiorari, subject to the 30-day limitation of F.R.A.P. 41(b), 28 U.S.C.

Reasons for Allowance of Writ

The instant case presents a significant question which should be determined by this Court: Whether primary jurisdiction for cases involving claims of mistreatment in penal institutions should lie in the state courts or in the federal courts. Petitioners do not contend that the federal courts are without jurisdiction altogether, but rather that state prisoners should be required to resort to state legal and equitable remedies before invoking federal relief under Section 1983.

The decisions of this Court do not resolve the issue. In *Johnson* v. *Avery*, 393 U. S. 483 (1969), a habeas corpus case, this Court acknowledged the right of prison inmates to render legal assistance to each other where no alternative means of assistance was available. However, this Court noted in its opinion: "There is no doubt that discipline and administration of state detention facilities are state functions. They are subject to federal authority only where paramount federal constitutional or statutory rights supervene." (393 U. S. at 486).

In *Zwickler* v. *Koota*, 389 U. S. 241 (1967), a case involving First Amendment rights, this Court stated that the judge-made doctrine of abstention could not preclude the exercise of federal jurisdiction except in narrowly limited "special circumstances." One such special circumstance was the susceptability of a state statute to a construction by the state courts that would avoid or modify the constitutional question. *Harrison* v. *NAACP*, 360 U. S. 167 (1959); *Reetz* v. *Bozanich*, 397 U. S. 82 (1970).

During the past year this Court held that non-intervention in state criminal processes was a principle of continuing validity, notwithstanding allegations of deprivations of First Amendment rights. *Younger* v. *Harris*, —— U. S. —— (Feb. 23, 1971, 39 U.S.L.W. 4201); *Samuels* v. *Mackell*, —— U. S. —— (Feb. 23, 1971, 39 U.S.L.W. 4211).

During 1970 this Court held that criminal convictions based upon a plea of guilty, where adequate assistance of counsel was afforded to the accused, could not be re-examined in federal habeas corpus proceedings where the petitioner claimed that the guilty plea was induced by an allegedly coerced confession. *McMann* v. *Richardson*, 397 U. S. 759 (1970).

Thus, there are two conflicting trends in this Court's decisions which require reconciliation in the context of prison treatment cases. The first is the desire of this Court to make federal forums available to suitors raising constitutional claims. The second is the reluctance of this Court to sanction federal intervention into state criminal and correctional processes. The experience of New York State provides one illustration of why this Court must determine the limits of these competing principles.

In 1967 the Court of Appeals for the Second Circuit reluctantly entertained jurisdiction in a prisoner civil rights action, without requiring exhaustion of state remedies, because the Court believed that the absence of injunctive relief under New York law rendered the state remedies inadequate. *Wright* v. *McMann*, 387 F. 2d 519 (1967). Subsequently, the New York Legislature in response to the invitation of the Court of Appeals amended its Civil Rights Law to remove any disabilities against a prisoner seeking to enjoin alleged unconstitutional treatment while incarcerated. (N. Y. Civil Rights Law, § 79-c, *supra*, p. 3).

Notwithstanding this legislative response to the *Wright* decision, and notwithstanding the Court's conclusion in

the instant case that respondent was not subjected to cruel and unusual punishment, the Court summarily held in the case at bar that respondent need not have exhausted legal or equitable remedies in the state courts before commencing the instant action.† By declining to recognize some form of non-intervention, albeit limited, in prison treatment cases, and by adjudicating all of respondent's claims on the merits, the Court failed to hold the line against the increasing intrusion of federal courts into matters that are primarily the concern of state government.

This intrusion has reached such alarming proportions that during the past year a distinguished member of the New York bench spoke out against the expansion of federal jurisdiction into the State's correctional processes. Presiding Justice J. Clarence Herlihy of the Appellate Division, Third Department, said in a speech to the Brooklyn Bar Association:

> "[The] haystack of federal jurisdiction seems to grow nonetheless. More recently, it has grown to include even the internal administration of our correctional system, a situation which has led by all accounts to a nearly complete disruption of an already troubled penal system, with effective rehabilitation and discipline virtually impossible . . .
>
> [A federal] decision 'with which we are now grappling held that certain acts of discipline which occurred several years ago at Clinton State Prison constituted cruel and unusual punishment.' As this is not a perfect world, I respect the court's findings of fact, although an expert criminologist testified that

† The statute providing for injunctive relief did not become effective until May, 1970, after respondent commenced the instant lawsuit, but the Court of Appeals did not base its ruling on this narrow ground.

° *Wright* v. *McMann*, 387 F. 2d 519, 521 (2d Cir. 1967).

severe discipline is frequently necessary in the unique subculture of a prison. In any event, the district court on remand did not limit itself to the isolated transactions involved, but extended its holding to the whole prison population, even to the extent of directing the Department of Correction to draft new disciplinary rules and regulations and submit them for the court's approval."** (New York State Bar Journal, June, 1971, 238-39).

Recently the Court of Appeals for the Eighth Circuit, in a decision which noted the enormous increase of prisoner lawsuits in the federal courts, held that prisoners who were challenging the conditions of their confinement under the federal habeas corpus statute were required to exhaust available state remedies. *Wilwording* v. *Swenson*, 439 F. 2d 1331 (1971). The Court's reasoning in that decision is relevant here:

> "In closing we think it appropriate to note the suggestion of the Attorney General of Missouri that the State of Missouri has statutory provisions relating to penal discipline, prison administration and conditions of judicially imposed confinements. When these laws are violated the Attorney General suggests that a prisoner may bring a suit for injunction, a writ of prohibition, or mandamus or a declaratory judgment in the state courts seeking relief. We have no way of knowing whether such petitions would be successful in reaching the merits, but that is no reason why cases of this type should not be presented to the Missouri courts in an appropriately recognized proceeding. And we assume that the Missouri courts will be diligent in protecting prisoners' rights where a proper case is presented." (433 F. 2d 1336-37).

** *Wright* v. *McMann*, 321 F. Supp. 127 (N.D.N.Y. 1970).

See Burns v. Swenson, 430 F. 2d 771 (8th Cir. 1970); *Cf. Brooks v. Wainwright*, 428 F. 2d 652 (5th Cir. 1970); *Haggerty v. Wainwright*, 427 F. 2d 1137 (5th Cir. 1970).

The practice of requiring state prisoners to initially pursue their remedies in the state courts rather than the federal courts is the better policy because the state has a compelling interest in seeing that its correctional system is running properly. In New York State, writs of habeas corpus and other matters are heard by the state judges at the maximum security prisons. These judges are better able to deal with problems of treatment than federal judges sitting many miles away. Furthermore, the state judges have responsibility for sentencing defendants to state facilities and therefore are vitally concerned about the conditions and programs at those institutions.

Since an inmate at a state institution is an unwilling guest, he often files numerous groundless complaints under § 1983. Not unexpectedly, § 1983 has become one of the most heavily litigated provisions of the United States Code. Note, *Limiting the Section 1983 Action in the Wake of* Monroe v. Pape, 82 Harv. L. Rev. 1486, 1487, n. 12 (1969). In 1970 the number of non-habeas corpus petitions filed by state prisoners in the federal courts increased by 41 per cent over 1969, and by 430 per cent over 1963. *Wilwording v. Swenson, supra*, 439 F. 2d 1331, 1333 n. 3 (8th Cir. 1971).

In *Rodriguez v. McGinnis*, —— F. 2d —— (2d Cir. March 16, 1971), Judge Hays expressed exasperation at having to deal with the burgeoning caseload of state prisoner complaints:

> "The issue in this case is typical of the increasing number of trivial questions of internal prison discipline now being brought, in the first instance, before the federal courts. If the results were not so serious for the administration of justice through state and

federal procedures, the spectacle of a federal court of appeals solemnly deciding on the penalty in terms of good time a state prisoner should receive for having dirty pictures in his cell (or for refusing to be a tattle tale) would be so absurd as to be laughable. But if this court entertains actions of this kind it will encourage state prisoners who have any kind of 'beef' to bring such actions and the federal courts will end up sitting as prison boards of discipline in the state prisons."

The range of subjects now litigated under § 1983 has reached the point where the Court of Appeals for the Fifth Circuit has been called upon to adjudicate a case involving haircuts and shaves (*Brooks* v. *Wainright*, *supra*, 428 F. 2d 652 [1970]), and the Court of Appeals for the Eighth Circuit has been forced to hear an appeal involving the alleged confiscation of an inmate's shoes: (*Howard* v. *Swenson*, 426 F. 2d 277 [1970]). As Justice Black aptly noted in his dissent in *Bivens* v. *Six Unknown Fed. Narcotics Agents*, —— U. S. —— (June 21, 1971):

> "My fellow Justices on this Court and our brethren throughout the federal judiciary know only too well the time consuming task of conscientiously poring over hundreds of thousands of pages of factual allegations of misconduct by police, judicial, and corrections officials. Of course, there are instances of legitimate grievances, but legislators might well desire to devote judicial resources to other problems of a more serious nature.
>
> We sit at the top of a judicial system accused by some of nearing the point of collapse. Many criminal defendants do not receive speedy trials and neither society nor the accused are assured of justice when inordinate delays occur. Citizens must wait years to litigate their private civil suits. Substantial changes in correctional and parole systems demand the atten-

> tion of the lawmakers and the judiciary. If I were a legislator I might well find these and other needs so pressing as to make me believe that the resources of lawyers and judges should be devoted to them rather than to civil damage actions against officers who generally strive to perform within constitutional bounds. There is also a real danger that such suits might deter officials from the *proper* and honest performance of their duties." (39 U.S.L. Week at 4834).

The instant case, with its broad range of subjects involving the internal management of a state prison, presents an opportunity for this Court to define the right of state inmates to seek federal relief in the first instance, and to determine the limits of such relief where adequate remedies are available in the state courts.

CONCLUSION

A writ of certiorari should issue to review the decision below on the question of federal intervention into state correctional processes.

Dated: New York, New York, August 15, 1971.

Respectfully submitted,

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